EDITOR'S NOTE

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(SHOW) PROCEEDINGS AND ORDERS DATE: 03119

CASE NBR 85-1-00800 CFX
SHORT TITLE Illinois DOCKETED: Nov 6 198
VERSUS Corps of Engr.. et al.

Date	Proceedings and Orders
Nov 6 1985	Petition for writ of certiorari filed.
Nov 6 1985	Appendix of petitioner Illinois filed.
Nov 27 1985	Order extending time to file response to petition until December 12, 1985.
Dec 6 1985	Brief amici curiae of Minnesota, et al. filed.
Dec 10 1985	Order extending time to file response to petition until January 8, 1986.
Dec 13 1985	Brief of respondent National Marine Service, Inc. in opposition filed. VIDED.
Jan 6 1986	Brief of respondents Corps of Engr., et al. in opposition filed. VIDED.
Jan 8 1986	DISTRIBUTED. January 24, 1986
Feb 7 1986	REDISTRIBUTED. February 21,1986.
Feb 24 1986	REDISTRIBUTED. February 28, 1986
Mar 3 1986	Petition DENIED. Dissenting opinion by Justice White.

CONTINUE (

PROCEEDINGS AND ORDERS DATE: 0311

CASE NBR 85-1-00800 CFX
SHORT TITLE Illinois DOCKETED: Nov 6 198
VERSUS Corps of Engr.. et al.

Date	Proceedings and Orders
Mar 3 1986	Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

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85-800

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RIVER ROAD ALLIANCE, INC., et al.,
Petitioners,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA JONES STEWART
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000
Attorneys for Petitioner
People of the State of Illinois

PATRICIA ROSEN*
EDWARD M. KAY
ANNE L. RAPKIN
JAMES L. MORGAN
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570
Of Counsel

* Counsel of Record

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QUESTIONS PRESENTED

1. In determining whether a federal agency's decision not to prepare an Environmental Impact Statement violates the provisions of the National Environmental Policy Act, should a "reasonableness" or an "arbitrary and capricious" standard of review be applied by lower federal courts?

2. Did the Court of Appeals err in holding that where a permit applicant claims there are no feasible alternatives to its proposed project, a federal agency may disregard its statutory duty to assess alternatives unless an environmental plaintiff proposes a feasible alternative overlooked by the applicant?

LIST OF PARTIES

The following is a list of all parties involved in this application for a Writ of Certiorari:

A. PETITIONERS:*

1. River Road Alliance, Inc.
2. Coalition for the Environment, Inc.
3. New Piasa Chautauqua, Inc.
4. Charles F. Hobbs
5. People of the State of Illinois.

B. RESPONDENTS:

1. Corps of Engineers of the United States Army
2. John O. Marsh, Jr., individually and as Secretary of the Army
3. William R. Gianelli, individually and as Assistant Secretary of the Army for Civil Works
4. Lt. Gen. Joseph K. Bratton, individually and as Chief of Engineers, Corps of Engineers of the United States Army
5. Col. Gary D. Beech, individually and as District Engineer for the St. Louis District, Corps of Engineers of the United States Army
6. National Marine Service Incorporated

* Petitioners River Road Alliance, Coalition for the Environment, New Piasa Chautauqua and Charles F. Hobbs are filing a separate petition.

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OPINIONS BELOW

The majority opinion of the Court of Appeals and the dissenting opinion of Judge Wood are reported at 764 F.2d 445 and are reproduced in the Appendix at App. 1-23. The judgment of the United States District Court for the Southern District of Illinois is not reported and is reproduced in the Appendix at App. 28-36. The Environmental Assessment of the Corps of Army Engineers and its findings of fact are reproduced in the Appendix at App. 38-67.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 17, 1985. Timely petitions for rehearing with suggestions for rehearing *en banc* were denied on August 8, 1985; five Circuit Judges voted, however, to grant rehearing in this case. (App. 26-27). This petition for a Writ of Certiorari is timely filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED*

42 U.S.C. §4332(1)

42 U.S.C. §4332(2)(A)

42 U.S.C. §4332(2)(B)

42 U.S.C. §4332(2)(C)

42 U.S.C. §4332(2)(E)

33 C.F.R. Part 230, Appendix B, par. 8(a)

33 C.F.R. Part 230, Appendix B, par. 8(b)

40 C.F.R. §1506.5(a)

40 C.F.R. §1506.5(b)

* These statutory provisions and regulations are set forth in the separately bound Appendix to this petition at App. 71-74.

STATEMENT OF THE CASE

On October 5, 1982, the United States Army Corps of Engineers ("Corps") granted National Marine Service, Inc. ("NMS") a permit authorizing the exclusive, private use by NMS of a five-acre portion of the Mississippi River as a barge fleeting area. The Corps granted this permit on the basis of an Environmental Assessment ("EA") and certain supplemental findings of fact ("FOF"), in which the Corps concluded that the project would not significantly affect the quality of the human environment, thereby making unnecessary the preparation of an environmental impact statement ("EIS") for this project.[1]

Substantial public and official opposition was voiced over the location of NMS's project in an area which combines many nationally and regionally recognized unique and significant features. The opposition sought to prevent degradation of these features, including the loss of outstanding scenic vistas and the destruction of certain increasingly rare aquatic life and essential aquatic habitat. This opposition culminated in the filing by petitioners of the cases at bar, one filed by River Road Alliance, Inc. and other public interest groups and concerned citizens ("Alliance"), and the second filed by the Attorney General for the State of Illinois on behalf of the People of the State of Illinois at the request of the Illinois Department of Conservation ("State"). The plaintiffs challenged

[1] NMS's desire for this fleeting facility was due in part to congestion at one of the locks on the Mississippi River which is being replaced. Construction on the lock is estimated to be completed some time in 1988. NMS's permit would supposedly expire at that time. (Administrative Record, Volume I, p. 316, hereafter "AR, Vol. ____, p. ____."

the Corps' non-compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321, *et seq.*, and the Corps' own regulations 33 C.F.R. Parts 230 and 320-325. Jurisdiction of the State's suit was based on 5 U.S.C. §702 and 28 U.S.C. §1331. Jurisdiction of Alliance's suit was based on 5 U.S.C. §702, 28 U.S.C. §§1331(a), 1337, 1361, and 16 U.S.C. §§1504(c) and (g)(1).

The District Court for the Southern District of Illinois ruled: (1) that the Corps' evaluation of the project's environmental impacts was inadequate to justify the Corps' finding of no significant impact, in violation of section 102(2)(C) of NEPA; (2) that the Corps' evaluation of impacts violated its own regulations; and (3) that the Corps failed to assess alternatives to the project in violation of section 102(2)(E), its own regulations, and those issued by the Council on Environmental Quality. (District Court Opinion, App. at 32-35).

In a split decision the Seventh Circuit Court of Appeals reversed the District Court, holding that the consideration given by the Corps to environmental impacts was neither arbitrary nor capricious. *River Road Alliance, Inc. v. Corps of Eng'rs of U.S. Army*, 764 F.2d 445, 449-452 (7th Cir. 1985). (Seventh Circuit Opinion, App. at 6-12) The Seventh Circuit further held that the Corps' failure to consider alternatives was excusable. 764 F.2d at 452-453. (App. at 12-13).

NMS' fleeting site is located along the Mississippi River approximately one-half mile downstream from Grafton, Illinois. Majestic limestone bluffs tower over the Mississippi River along the shoreline adjacent to the fleeting site. For nearly forty years the State of Illinois had sought to construct a highway at the foot of the bluffs to provide public access to these vistas. Its efforts finally succeeded in the early 1970s with the completion of a four-lane highway

with bicycle lanes between Grafton and Alton, Illinois, which lies to the south of Grafton. Using federal funds, the State had acquired scenic easements from and condemned land belonging to local landowners (including the land immediately upstream of this site) for the purpose of preserving the area's natural beauty. (AR, Vol. II, pp. 35, 67, *see also, Department of Public Works and Bldgs. v. Keller*, 61 Ill. 2d 320, 335 N.E.2d 443 (1975)). The scenic value of this area was recognized at the national level by Congressional designation of this highway as part of the Great River Road. The Great River Road is the National Scenic Highway, created by Congress in 1973 (23 U.S.C. § 148) in order to provide the public with ready access to scenic views and other unique features and recreational opportunities along the length of the Mississippi River from Lake Itasca, Minnesota, to the Gulf of Mexico. (23 C.F.R. §§661.4(b) and (e)) (AR, Vol. I, p. 256) (FOF at App. 54-55)

In its EA, the Corps conceded that the bluff and river areas at and downstream from the worksite provide some of the most impressive and unique vistas of any area along the Mississippi. (AR, Vol. I, p. 224) (EA at App. 39) Although barges fleeted at the site would block any view of the river from the 1500 feet of the highway adjacent to the site and for substantial distances up and downstream from the site, the Corps concluded that this scenic impact was insignificant. (AR, Vol. I, p. 224; Vol. II, pp. 40-63, 66-71 (EA at App. 39)

The Seventh Circuit determined that the Corps' consideration of the loss of these scenic vistas was adequate. *River Road Alliance, supra*, 764 F.2d at 451. (Seventh Circuit Opinion, App. at 10) The Corps' evaluation of this impact, however, focused solely on the 1500 feet of shoreline adjacent to the site. The Corps ignored the fact that

the fleeting area would mar the vistas available from substantial portions of the road up and downstream from the site. (AR, Vol. II, pp. 40-44; 66-71) The Corps and the Seventh Circuit also ignored the fact that the view along the four mile portion of the Great River Road nearest Alton was already blocked by several barge fleeting areas, making the project site one of the last unspoiled spots of natural beauty along the Mississippi River. (AR, Vol. II, pp. 71; 140-141; 159-160) The Corps also failed to consider whether introduction of another fleeting area along this portion of the Great River Road was consistent with the prior State efforts to preserve the scenic character of the area, focusing instead on the technical question of whether the barge fleeting violated the State's scenic easements. (AR, Vol. I, p. 256) (FOF at App. 54-55)

The vicinity of the fleeting area also serves as valuable habitat for certain increasingly threatened varieties of aquatic life. One of the largest remaining mussel beds in the Upper Mississippi and Illinois Rivers extends under and downstream of the fleeting site. (AR, Vol. I, pp. 64-66) Mussels are commercially harvested and play important roles in both the food chain for certain fish and birds and in the natural purification process of the river. (AR, Vol. I, pp. 64-66) The river bottom underlying and near the site also provides potentially irreplaceable overwintering habitat for catfish, one of the primary commercially harvested fish in the Upper Mississippi River. (AR, Vol. II, p. 151)

Both the United States Fish and Wildlife Service ("USFWS") and the Illinois Department of Conservation ("IDOC") objected strenuously to the project because of its potential adverse impacts on this aquatic life and habitat. These two agencies were concerned that towboat propeller wash accompanying the movement of barges into

and out of the site could severely disrupt or even destroy the mussel bed, either by burying the mussels under resuspended sediment or by striking or washing them away. (AR, Vol. I, pp. 64-66; 69-71) USFWS and the Illinois State Natural History Survey also noted that towboat propeller wash could damage habitat for overwintering catfish. (AR, Vol. I, pp. 268-272; Vol. II, p. 151)

The Corps' consideration of potential impacts on the mussel bed raised more questions than it answered. In response to the warnings of IDOC and USFWS, but without obtaining any input from those agencies, the Corps requested the applicant to conduct a mussel study. (AR, Vol. I, pp. 164-165) The applicant concluded that although "excessive sedimentation could eliminate virtually all of the mussel species" present in the bed (AR, Vol. I, p. 184), the fleeting area would not adversely affect the bed. (AR, Vol. I, p. 186) The Corps, USFWS, and IDOC each criticized the applicant's failure to obtain information essential to determining impacts—such as the amount of barge traffic in and out of the fleeting site, existing uses of the area, and the nature of the river bottom sediments. (AR, Vol. I, pp. 208; 219-222) The Corps itself challenged one of the applicant's key conclusions: that river bottom sediments resuspended by fleeting operations would not be deposited on the bed. (AR, Vol. I, p. 257) (FOF at App. 57) Nevertheless, the Corps failed to obtain the missing information or to reject the applicant's key conclusion. The Corps also declined to consider the project's impact on overwintering catfish in its EA and FOF. Nonetheless, the Seventh Circuit concluded that the consideration given these impacts was not arbitrary or capricious. *River Road Alliance, supra*, 764 F.2d at 452 (Seventh Circuit Op. at App. 11)

The Corps also refused to independently develop and evaluate any alternative sites for NMS's project as it was required to do under section 102(2)(E) of NEPA. NMS had claimed that no suitable alternative fleeting sites were available. The Corps itself rejected this claim as unsupported (AR, Vol. I, p. 258) (FOF at App. 58), but nonetheless failed to independently evaluate feasible alternatives with lesser adverse environmental impacts. (AR, Vol. I, p. 258) (FOF at App. 58) The Seventh Circuit found that the Corps could disregard its section 102(2)(E) duties in the absence of any efforts by petitioners to show that NMS had overlooked some plausible alternative site. *River Road Alliance, supra*, 764 F.2d at 452-453; (Seventh Circuit Op. at App. 12-13)

REASONS FOR ALLOWING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS OVER WHETHER A REASONABLENESS OR ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW SHOULD BE APPLIED IN ASSESSING THE PROPRIETY OF AN AGENCY'S DECISION NOT TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT UNDER THE PROVISIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT.

This case provides yet another opportunity[2] for this Court to resolve a longstanding conflict among the circuits

[2] On October 2, 1985, a petition for a Writ of Certiorari was filed in the case of *Dravo Basic Materials Co. v. Louisiana*, No. 85-569, asking this Court to grant certiorari for the same reason discussed here.

over the appropriate standard of review to be applied in determining whether a federal agency's decision not to prepare an environmental impact statement ("EIS") violates the provisions of the National Environmental Policy Act ("NEPA"). (42 U.S.C. §4321 *et seq.*) *See: Gee v. Boyd*, ___ U.S. ___, 105 S.Ct. 2123 (1985) (White, J., dissenting from denial of Certiorari).[3]

Section 102(2)(C) of NEPA (42 U.S.C. §4332(2)(C)) requires that an EIS be prepared for every major federal action significantly affecting the quality of the human environment. The majority opinion found that the permit issuance here was a major federal action, *River Road Alliance, Inc. v. Corps of Eng'rs of U.S. Army*, 764 F.2d 445, 450 (7th Cir. 1985) (Seventh Circuit Op. at App. 7-8), so the only remaining issue was whether this project had a significant impact on some aspect of the human environment.

At least two different standards are now being applied by lower federal courts in reviewing findings of no significant impact. The First, Second and Fourth Circuits, like the Seventh, will reverse such agency action only if it is arbitrary and capricious. *See: Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980); *Hanley v. Kleindienst*, 471 F.2d 823, 828-29 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973); *Webb v. Gorsuch*, 699 F.2d 157, 159 (4th Cir. 1983). The Fifth, Eighth, Ninth and Tenth Circuits, however, apply a "reasonableness" standard in reviewing an agency's finding of no significant im-

[3] In *Gee v. Boyd*, ___ U.S. ___, 105 S.Ct. 2123 (1985), Justice White stated in his dissent that certiorari should be granted to end this confusion among the circuits over what standard should be applied to an agency's decision not to prepare an EIS. (105 S. Ct. at 2126) Justice Brennan and Justice Marshall joined in Justice White's dissent.

pact. *See: Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973); *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 271 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980); *Foundation for North American Wild Sheep v. United States Dept. of Agriculture*, 681 F.2d 1172, 1177-1178 (9th Cir. 1982); *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1248-1249 (10th Cir. 1973).

The Third Circuit has assumed, without deciding, that a reasonableness test is appropriate. *Township of Lower Alloways Creek v. Public Service Electric & Gas Co.*, 687 F.2d 732, 741-742 (3d Cir. 1982). The Sixth Circuit requires a "reasoned determination" to support a finding of no significant impact, but has declined to choose between the two competing standards. *Boles v. Onton Dock, Inc.*, 659 F.2d 74, 75 (6th Cir. 1981). The Eleventh Circuit follows the reasonableness standard adopted by the Fifth Circuit since decisions of the Fifth Circuit rendered before October 1, 1981 are binding on it. *See: Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981). The District of Columbia Circuit has arguably developed a third standard for reviewing such agency action. *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 681-682 (D.C. Cir. 1982).[4]

[4] The District of Columbia Circuit applies a four-part test:

(1) Whether the agency took a "hard look" at the problem.

(2) Whether the agency identified the relevant areas of environmental concern.

(3) As to the problems studied and identified, whether the agency made a convincing case that the impact was insignificant.

(4) If there was an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum. (*Cabinet Mountains Wilderness, supra*, 685 F.2d at 682).

This conflict among the circuits is not merely semantic or academic. *Gee v. Boyd*, ____ U.S. ____, 105 S.Ct. 2123, 2125 (1985) (White J., dissenting from denial of certiorari); *Fritiofson v. Alexander*, 772 F.2d 1225, 1237 (5th Cir. 1985). It has been recognized by the courts and commentators alike that greater deference to an agency's decision is usually given under the arbitrary and capricious test than under the reasonableness test. *See, e.g. Township of Lower Alloways Creek v. Public Service Electric & Gas Co.*, 687 F.2d 732, 742 (3d Cir. 1982); Shea, *The Judicial Standard for Review of Environmental Impact Statement Threshold Decisions*, 9 B.C. Envtl. Aff.L. Rev. 63, 79 (1980). It is for this reason that a more rigorous standard of review has been developed by the Fifth, Eighth, Ninth and Tenth Circuits in order to insure that the purposes for which NEPA was enacted would be carried out by federal agencies. That standard should have been applied by the Seventh Circuit in this case.

NEPA reflects congressional concern with environmental degradation and its long-term adverse effects on biological survival and the quality of human life. NEPA establishes substantive goals consistent with those concerns, and creates a framework for accomplishing those goals. The purposes of the statute are:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation * * *. (42 U.S.C. §4321)

Section 101 provides that it is the federal government's "continuing responsibility . . . in cooperation with State

and local governments" to use all practicable means to conduct itself as a trustee of the environment for future generations, to avoid as far as possible environmental degradation, to assure for all Americans esthetically pleasing surroundings, to preserve important historic, cultural, and natural aspects of our national heritage, and to achieve an appropriate balance between population and resource utilization. (42 U.S.C. §4331) Section 102 expressly directs that, "to the fullest extent possible," federal regulations and laws be "interpreted and administered in accordance with the policies of [NEPA]", and that all federal agencies take an interdisciplinary approach in making decisions which bear on the environment, and develop procedures to insure that "unquantified environmental amenities and values" are considered in decision-making along with economic and technical considerations. (42 U.S.C. §§4332(1), 4332(2)(A)(B))

In addition, section 102 establishes the primary "action-forcing" procedural mechanism by means of which federal agencies implement the statute's substantive goals and policies. *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976); *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Com'n.*, 449 F.2d 1109, 1112-1113 (D.C. Cir. 1971). This mechanism is what is commonly referred to as the Environmental Impact Statement which must be prepared for every major federal action significantly affecting the quality of the human environment. (42 U.S.C. §4332(2)(C)) The preeminent purposes of this process are to force federal agencies to take a "hard look" at the environmental consequences of a proposed project, consider viable alternatives to the method chosen to achieve the aims of the project, and endeavor to minimize adverse environmental consequences of the proposal. *Citizen Advocates for Responsible Expansion v. Dole*, 770 F.2d 423, 431-432 (5th Cir. 1985).

A federal agency's finding of no significant impact, however, pretermits this fact-gathering process designed by Congress to ensure that environmental concerns are considered "to the fullest extent possible." *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973); *State of Louisiana v. Lee*, 758 F.2d 1081, 1085 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3254 (U.S. Oct. 2, 1985) (No. 85-569). Hence, "the spirit of the Act would die aborning if a facile, ex-parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review." *Save Our Ten Acres v. Kreger, supra*, 472 F.2d at 460. Consequently, the more searching reasonableness standard should be applied in reviewing a finding of no significant impact to ensure that federal agencies have lived up to the high standards set by NEPA to take a "hard look" at every potential environmental effect of a proposed project. *See, e.g., Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973); *Citizen Advocates for Responsible Expansion v. Dole*, 770 F.2d 423, 439 n.19 (5th Cir. 1985).

Under the reasonableness standard, an environmental plaintiff has the initial burden of alleging facts that show that a project *may* significantly degrade some human environmental factor. *State of Louisiana v. Lee, supra*, 758 F.2d at 1084; *The Steamboaters v. F.E.R.C.*, 759 F.2d 1382, 1392 (9th Cir. 1985). Once this burden is met, the court reviews the administrative record to determine whether the agency reasonably concluded that the project would have absolutely no effects which would significantly degrade any aspect of environmental quality. *State of Louisiana v. Lee, supra*, 758 F.2d at 1085. If the Court concludes that no environmental factor would be significantly degraded, the agency's decision is upheld. *State of*

Louisiana v. Lee, supra, 758 F.2d at 1084. But, on the other hand,

> . . . if the court finds that the project may cause a significant degradation of some human environmental factor (even though other environmental factors are affected beneficially or not at all) the court should require the filing of an impact statement or grant (the plaintiff] such other equitable relief as it deems appropriate. *Save Our Ten Acres v. Kreger,* 472 F.2d 463, 467 (5th Cir. 1973).

The Court, therefore, need not determine whether the project would degrade *every* aspect of environmental quality, but merely whether the project might affect above a minimal level a *single* environmental factor. *Citizen Advocates for Responsible Expansion v. Dole,* 770 F.2d 423, 432-433, 439 (5th Cir. 1985).

An application of the reasonableness standard in this case demonstrates that the Corps improperly concluded that NMS's project would have absolutely no effects which would significantly degrade any aspect of environmental quality, and therefore, failed to take a "hard look" at the consequences of its actions.

Here, petitioners raised a substantial environmental issue concerning the project's impact on the aesthetic values of this area. Majestic limestone bluffs tower over the Mississippi River along the shoreline adjacent to the site chosen by NMS to fleet its barges. At the foot of these bluffs, Illinois has constructed a highway providing public access to these magnificent vistas and, using federal funds, has sought to preserve the great natural and scenic beauty of this portion of the highway. The aesthetic value of this area was recognized at the national level by Congressional designation of this highway as a portion of the Great River Road, the only National Scenic Highway. The

portion of the Great River Road affected by NMS's project has been enjoyed by millions of people, many of whom use it as the main access route to Pere Marquette State Park, one of the most heavily visited parks in Illinois with over one million visitors each year. The public also uses the Great River Road for biking, hiking and jogging in lanes specially provided for these purposes.

The fact that the instant project may affect this environmentally sensitive area is not seriously disputed by Respondents and, indeed, was conceded by the Seventh Circuit in its majority opinion. The majority opinion found that this project would be "an unfortunate eyesore marring one of the few remaining spots of essentially unspoiled natural beauty on the Mississippi River * * *." *River Road Alliance, Inc. v. Corps of Eng'rs of U.S. Army,* 764 F.2d 445, 450 (7th Cir. 1985) (Seventh Circuit Op. at App. 7) This adverse impact consists in the obstruction of the scenic views from the Great River Road, and the introduction of an industrial activity into a previously undisturbed natural setting. Precisely this kind of aesthetic and visual degradation of the human environment is a matter of Congressional concern under NEPA. *Citizen Advocates for Responsible Expansion v. Dole,* 770 F.2d 423, 439 (5th Cir. 1985); *See also: Minnesota Public Interest Research Group v. Butz,* 498 F.2d 1314, 1322 (8th Cir. 1974). Had the Seventh Circuit applied the reasonableness standard under these circumstances, it would have been compelled to conclude that NMS's project might significantly degrade the human environment and to hold that the Corps unlawfully issued a finding of no significant impact.

Petitioners also raised substantial environmental issues concerning the project's impact on aquatic life at the project site. One of the last remaining large mussel beds in the Upper Mississippi River lies beneath and downstream

of the NMS site. The Corps required NMS to study whether the fleeting site would significantly affect the mussel bed. NMS found that excessive sedimentation (i.e. resuspension of river bottom sediments by towboat propeller wash and subsequent redeposition) could eliminate virtually all of the fourteen mussel species present in the bed, and that even moderate accumulations could eliminate six of the fourteen species and reduce the population to approximately one-half of its present level.

Having thus identified the levels of sedimentation at which significant impacts would occur, neither the applicant nor the Corps made any effort to determine the extent of sedimentation likely to occur here. Neither took samples of the river bottom sediments at the site, nor obtained information about the amount of barge traffic expected to move in and out of the site. The USFWS questioned the failure to acquire the first type of information and the Corps' own environmental expert questioned the failure to obtain the latter. Contrary to its own regulations, the Corps did not attempt to supply the applicant's missing data or to gauge the amount of sedimentation to be expected or the extent of its impact on the mussel bed before issuing the finding of no significant impact. 33 C.F.R. §230.7(e) and Appendix B, par. 8(b). The omission of any meaningful consideration of such fundamental matters demonstrates that the Corps unreasonably concluded that this project would have no significant impact on this aspect of the environment. *See: Foundation for North American Wild Sheep v. United States Dep't. of Agriculture*, 681 F.2d 1172, 1177-1179 (9th Cir. 1982).

The Corps attempted to mitigate the project's impact on the mussel bed by conditioning continued operations on the absence of significant damage to the mussel bed. (AR, Vol. I, p. 315) However, by placing this condition

on the permit, it is clear that the Corps impliedly found that this project *could* in fact affect the mussels above a minimum level. The Corps' "wait and see" attitude is irrational and represents the very type of agency conduct unacceptable under NEPA. *Foundation for North American Wild Sheep v. United States Dep't. of Agriculture, supra*, 681 F.2d at 1181.

Moreover, as the record of the Corps' public hearing indicates, fleeting activities at the site may significantly degrade habitat for overwintering channel catfish. USFWS, as well as an aquatic biologist with the Illinois Natural History Survey, argued that overwintering catfish could be adversely affected by fleeting activities and that channel catfish had diminished greatly in recent years, indicating that further potential impacts on catfish should be closely scrutinized. The Corps, however, did not consider this potential impact in either its EA or FOF (App. 38-42; 43-67), and therefore, its finding of no significant impact was unreasonable.

The above discussion shows how the instant petitioners, and indeed all environmental plaintiffs, would benefit from an application of the reasonableness test in reviewing an agency's finding of no significant impact and its decision not to prepare an EIS. Because NMS's project might negatively affect, above a minimal level, the aesthetic and aquatic values identified in this case, the Corps unreasonably concluded that this project would have absolutely no effects which would significantly degrade any aspect of environmental quality. Therefore, had the Seventh Circuit applied the reasonableness standard, it would have been required to hold that the Corps unlawfully issued

a finding of no significant impact for NMS's project, and to direct the Corps to prepare an EIS.[5]

This case provides an opportunity for this Court to resolve the conflict among the circuits over the review standard to be applied in these circumstances. Therefore, certiorari should be granted to articulate a test to ensure that federal agencies live up to NEPA's high standards by adequately considering to the fullest extent possible the potential environmental effects of proposed projects.

II.

CERTIORARI SHOULD BE GRANTED TO REVERSE THE SEVENTH CIRCUIT'S DECISION JUDICIALLY REPEALING SECTION 102(2)(E) OF THE NATIONAL ENVIRONMENTAL POLICY ACT BY ALLOWING A FEDERAL AGENCY TO DISREGARD ITS STATUTORY DUTY TO ASSESS ALTERNATIVES WHENEVER A PERMIT APPLICANT CLAIMS THERE ARE NO FEASIBLE ALTERNATIVES TO ITS PROPOSED PROJECT AND THE ENVIRONMENTAL PLAINTIFF HAS NOT PROPOSED A FEASIBLE ALTERNATIVE OVERLOOKED BY THE PERMIT APPLICANT.

The action of the Seventh Circuit has produced a question of first impression and national importance concerning the affirmative duties of a federal agency under section 102(2)(E) of NEPA. Section 102(2)(E) obliges agencies to "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." (42 U.S.C. §4332(2)(E))

[5] Petitioners also raised substantial environmental issues concerning adverse effects on the historic towns of Elsah and Chautauqua and recreational activities. Under the reasonableness standard, the impacts on these concerns would not need to be analyzed on judicial review because petitioners have already shown that this project may significantly affect some environmental factor. The Corps, however, would be required to address these other concerns in its EIS. *Citizen Advocates For Responsible Expansion v. Dole*, 770 F.2d 423, 439, n.20 (5th Cir. 1985).

In an unprecedented decision, the Seventh Circuit has determined that where a permit applicant claims there are no feasible alternatives to its proposed project, the federal agency may disregard its statutory duty to assess alternatives unless an environmental plaintiff proposes a feasible alternative overlooked by the applicant. This ruling is contrary to the plain language of section 102(2)(E) and undermines NEPA's goal of ensuring that agencies are fully informed of the environmental consequences of their actions.

In enacting section 102(2)(E),

> [Congress] intended to emphasize an important part of NEPA's theme that all change was not progress and to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or accomplishing the same result by entirely different means. (*Environmental Defense Fund, Inc. v. Corps of Engineers*, 492 F.2d 1123, 1135 (5th Cir. 1975))

The object of this provision is,

> [to] ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely the most intelligent, optimally beneficial decision will ultimately be made. (*Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Com'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971))

Contrary to this express intent of section 102(2)(E), the Seventh Circuit has now decided that an agency's duty to "study, develop, and describe" alternatives is satisfied by allowing the permit applicant alone to select and reject alternatives. *River Road Alliance, Inc. v. Corps of Eng'rs of U.S. Army*, 764 F.2d 445, 446-447 (7th Cir. 1985) (Seventh Circuit Op. at App. 12-13) Not only does this new rule ignore the applicable statutory language which creates an *agency* obligation, not an *applicant* obligation, but it defies common sense. It is obvious that a permit applicant has no incentive to find a site or course of action which is less convenient than the one he is pursuing with the agency. Finding a feasible alternative with less adverse environmental impact can only jeopardize his application for the site which he prefers. In other words, an applicant's own economic self-interest precludes an objective assessment on his part of the alternatives. As Judge Wood cogently noted in his dissent: "Permitting the company by itself and for itself to find and propose an alternative site less convenient for its pocketbook is a little like consulting the fox about the best location for the chicken house." *River Road Alliance, Inc. v. Corps of Eng'rs of U.S. Army, supra*, 764 F.2d at 457-458. (Wood, J., dissenting). (Dissenting Op. at App. 22)

Section 102(2)(E) was enacted to infuse an objective viewpoint into the balancing of the applicant's private economic interests with the public's interests in environmental quality and biological survival. For this reason, the courts have consistently held that the agency's responsibilities under NEPA are primary and non-delegable, and that the agency must independently evaluate alternatives submitted by an interested party. *Steubing v. Brinegar*, 511 F.2d 489, 496 (2d Cir. 1975); *Sierra Club v. Hodel*, 544 F.2d 1036, 1043-44 (9th Cir. 1976); *Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88, 94 (2d Cir. 1975). The

Corps' own NEPA-implementing regulations require the Corps to independently verify information provided by an applicant, 33 C.F.R. part 230 App. B, pars. 8(a), (b), as do the regulations of the Council on Environmental Quality, 40 C.F.R. §1506.5(a), (b).[6] If, as the courts have said, the alternative assessment is the "lynchpin" of the NEPA process, (*NRDC v. Callaway*, 524 F.2d 79, 92 (2d Cir. 1975), no other approach makes sense.

In this case, the Corps itself rejected the applicant's analysis of alternatives, finding that it was insufficiently broad and thorough:

> [W]e believe several prospective fleeting sites could be found as alternatives to [the applicant's] proposed site at Grafton . . . [W]e do not concur in applicant's conclusion that alternative sites do not exist. (AR, Vol. I, p. 258) (FOF at App. 58)

Having rejected NMS's conclusion that no alternatives exist, the Corps nonetheless chose to approve NMS's application without itself seeking any information about the availability of any environmentally sounder alternative site. In this manner, the Corps not only violated the mandate of Section 102(2)(E), but assured that an objective attempt to find alternatives and balance public and private needs would not be made.[7]

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[6] The majority opinion held that the Council's regulations are "nondirective". (764 F.2d at 450) (Seventh Circuit Op. at 8). This holding conflicts with rulings from other circuits which have found these regulations to be binding on federal agencies. *E.g., Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1244 (9th Cir. 1984); *State of Louisiana v. Lee*, 758 F.2d 1081, 1083 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3254 (U.S. Oct. 2, 1985) (No. 85-569).

[7] The Corps justified its action on the ground that alternative fleeting sites would not be as convenient for NMS as the site NMS chose. (AR, Vol. I, p. 258) (FOF at App. 58). However, the

(Footnote continued on following page)

In its opinion in this case, however, the Seventh Circuit sanctioned this highly irregular conduct by ruling that it was up to the environmental plaintiffs, not the Corps, to "shoulder the burden" of proposing alternative sites. *River Road Alliance, Inc. v. Corps of Eng'rs of U.S. Army*, 764 F.2d 445, 452-453 (7th Cir. 1985) (Seventh Circuit Op. at App. 13) This ruling is inconsistent with the fundamental thrust and purpose of NEPA. NEPA was enacted for the benefit of the public and imposes affirmative duties on federal agencies, as "trustees of the environment for future generations," to evaluate the environmental consequences of their actions. (42 U.S.C. §4331) These duties are imposed on the federal agencies, and not on the concerned public for whose benefit NEPA was enacted. *Scherr v. Volpe*, 466 F.2d 1027, 1034 (7th Cir. 1972).

In this case, the Seventh Circuit read section 102(2)(E) out of NEPA. Where the interested party is given the responsibility for protecting the public's interest and where the public's interest conflicts with its own, NEPA has been judicially repealed. Certiorari should be granted to address this action of the Seventh Circuit and to resurrect NEPA's mandate to the federal agencies.

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[7] *continued*
fact that an alternative site may not be as convenient as the one the applicant prefers does not mean that the alternative site is not feasible and does not strike a reasonable balance between public and private needs.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA JONES STEWART
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000

Attorneys for Petitioner
People of the State of Illinois

PATRICIA ROSEN*
EDWARD M. KAY
ANNE L. RAPKIN
JAMES L. MORGAN
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570
Of Counsel

* Counsel of Record

No. 85-800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RIVER ROAD ALLIANCE, INC., et al.,

Petitioners,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, et al.,

Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA JONES STEWART
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000

Attorneys for Petitioner
People of the State of Illinois

PATRICIA ROSEN*
EDWARD M. KAY
ANNE L. RAPKIN
JAMES L. MORGAN
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570

Of Counsel

* Counsel of Record

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IN THE
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Nos. 84-1689, 84-2045

RIVER ROAD ALLIANCE, INC., et al.,
Plaintiffs-Appellees,

v.

CORPS OF ENGINEERS OF
UNITED STATES ARMY, et al.,
Defendants-Appellants,

NATIONAL MARINE SERVICE INC.,
Defendant-Intervenor-Appellant.

Appeals from the United States District Court
for the Southern District of Illinois, Alton Division.
Nos. 82 C 5285, 83 C 5071—**William L. Beatty**, Judge.

ARGUED JANUARY 8, 1985—DECIDED MAY 17, 1985

Before WOOD, ESCHBACH, and POSNER, *Circuit Judges.*

POSNER, *Circuit Judge.* We must decide whether, as the district court held, the Army Corps of Engineers violated section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332, by granting a permit to National Marine Service Inc. for a temporary barge fleeting facility on the Mississippi River without having adequately considered the environmental consequences.

In 1980 National Marine Service (actually its predecessor, but we shall simplify the facts to shorten our opinion) applied to the Corps of Engineers for a permit under section 10 of the River and Harbors Appropriation Act of 1899, 33 U.S.C. § 403, for a barge fleeting facility on

the Illinois bank of the Mississippi, just below the town of Grafton. A fleeting facility is a maritime parking lot—a place where barges are either anchored or moored to buoys while waiting to be towed. The facility was to have a capacity of 30 barges and to occupy 1,500 feet (and cover an area of five acres of water) of a seven-mile scenic stretch along what is called "Alton Lake" or "Alton Pool," but is actually a part of the Mississippi River. The State of Illinois, an appellee, acknowledges that Alton Lake "undergoes heavy barge traffic"; as many as 300 barges pass through it in a day. But the shores of the scenic portion are free from commercial development, except that National Marine Service has a shipyard, with until recently a fleeting facility attached, a half mile north of the proposed site. National Marine Service had leased that fleeting facility from the Illinois Department of Transportation, which cancelled the lease during this lawsuit.

The Illinois shore of Alton Lake is surmounted by dramatic bluffs; the Missouri shore is farm land. A scenic highway, the Great River Road, runs along the Illinois shore beneath the bluffs, and motorists have a view of Alton Lake and the Missouri shore beyond as well as of the bluffs to their east. (See Figure 1 at end of opinion.) National Marine Service's desire for the proposed fleeting facility was due in part to congestion at one of the locks of the Mississippi River. The lock is to be replaced (originally this was to be in 1987, but the current estimate is 1988), and the facility discontinued when that happens.

After holding a public hearing on the environmental impact of the proposed facility, the Corps of Engineers issued an "environmental assessment" which concluded that the facility would have no significant environmental impact. Concerning the facility's aesthetic impact, the Corps, while acknowledging that "bluff and river areas at and downstream of applicant's worksite clearly provide some of the most impressive and unique vistas of any area along the Mississippi River" and that "in the opinion of some individuals, the presence of [National Marine]'s proposed fleeting facility, or any similar intrusion into the

natural setting, would be aesthetically objectionable," noted that "other individuals welcome the opportunity afforded by the Great River Road for a closeup view of towboats and barges. In addition to the static visual effect of moored barge fleets, a fleeting operation also presents a view of normal activities on the waterway as small push boats work to move barges in and out of fleets during the disassembly and assembly of large tows. In any event, the aesthetic impairment, or enhancement, should be minimal since [National Marine]'s fleet will be limited to the length of six barges. If a motorist were proceeding along Great River road at a rate of 40 miles per hour, a fleet six barges long would obstruct his view of the river for less than 25 seconds."

Among other issues addressed in the environmental assessment was the possible impact of the proposed fleeting facility on a very large mussel bed downstream. There was concern that while the barges were being towed into and out of the facility, and assembled into tows or disassembled, the propellers of the tug boats would stir up silt on the river bottom, and this silt would drift down onto the mussels and smother them. The environmental assessment (as fleshed out by later documents prepared by the Corps) noted that none of the mussels were members of any endangered species, but it directed that the mussel beds be inspected again after the facility had been in operation for two years. Later in the administrative process, concern was expressed that the facility might hurt wintering catfish. There was also concern that no fishing of any kind would be possible along the stretch of shoreline that the facility would occupy, and that boating and other sports might also be harmed. The Corps did not think any of these consequences would be serious, nor that two historic towns, respectively 1.5 and 4.0 miles downstream from and out of sight of the facility, would be harmed.

The National Environmental Policy Act requires a federal agency to "include in every recommendation or report on proposals for legislation and other major Federal

actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action." 42 U.S.C. § 4332(2)(C). Since the Corps found that the proposed barge fleeting facility would have no significant effect on the environment, it did not think it had to prepare the detailed environmental impact statement envisaged by section 4332(2)(C)(i); and if its premise was correct, so was its conclusion. See 40 C.F.R. §§ 1501.4(e), 1508.13 (regulations of Council on Environmental Quality). Since the proposed facility met the Corps' own cost-benefit criteria, see 33 C.F.R. § 320.4(a)(1), the Corps issued a permit for the facility, to expire however when the lock is replaced.

The facility went into operation in 1982. It operated at 30-40 percent capacity (9 to 12 barges) during the summer, the peak tourist season. A neighborhood group, and later the State of Illinois, brought this suit to enjoin it; the injunction was granted; and in 1984 the facility was shut down pending the outcome of this appeal. In granting the injunction the district judge issued an opinion that the plaintiffs had prepared for his signature. The main conclusion in the opinion is that the Corps of Engineers did not take a careful enough look at the environmental impact of the fleeting facility. The usual consequence of such a decision is an order to prepare an environmental impact statement. Although the district judge did not order the Corps to do so, and indeed expressly declined to decide whether the Corps had to do so, we find it hard to see how the Corps could have met his objections to the adequacy of its environmental assessment without doing so. The parties indicate implicit agreement with this point by relying for the most part on cases in which the question was whether an environmental impact statement had to be filed. We can therefore promote clarity by recasting the main issue on appeal as whether the Corps should have prepared an environmental impact statement. If we are right that the Corps did not violate section 102's requirement of such a statement for

all major federal actions having a significant environmental impact, or the section's separate requirement of consideration of alternatives to the proposed action, the plaintiffs' reservations about the adequacy of the environmental assessment and of related documents that the Corps did prepare would not warrant our upholding the district court's decision and returning the case to the Corps to prepare a somewhat more elaborate environmental assessment that would still fall short of being a full-fledged environmental impact statement.

Although the statute does not indicate how lengthy or detailed an environmental impact statement must be, and the required length and detail will of course vary with the nature of the proposed action whose impact is being studied, the implementing regulations require a formidable document. It will often be multi-volume and cost the government and the private applicant (if there is one, as there is here) hundreds of thousands of dollars to prepare; $250,000 is the estimate in this case. See 33 C.F.R. § 230.11; 33 C.F.R. Part 230, App. B, ¶¶ 3, 10-11. An environmental impact statement consisting of 858 pages plus two appendix volumes is mentioned in National Environmental Policy Act Oversight, Hearings Before Subcomm. on Fisheries, Etc., of H. Comm. on Merchant Marine and Fisheries, 94th Cong., 1st Sess., ser. 94-14, at 172 (G.P.O. 1975). If such a statement were required for every proposed federal action that might affect the environment, federal governmental activity and the private activity dependent on it would pretty much grind to a halt. The Corps of Engineers alone receives more than 14,000 permit applications a year. Applying for a routine permit would often be economically infeasible if an environmental impact statement were always required. So it is no surprise that the statute does not require such a statement for every federal action having some environmental impact. The action must be "major," and the impact "significant." The Corps filed only 119 environmental impact statements in 1983. Council on Environmental Quality, Environmental Quality 1983, at 333 (1983) (tab. A-81).

The purpose of an environmental assessment is to determine whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an environmental impact statement. See also 33 C.F.R. § 230.10. The environmental assessment is a brief document, see 40 C.F.R. § 1508.9, which under the Corps of Engineers' regulations is normally not to exceed 15 pages, see 33 C.F.R. § 230.9, and which here was only 4 pages long but was supplemented by 17 pages of additional findings. The statutory concept of "significant" impact has no determinate meaning, and to interpret it sensibly in particular cases requires a comparison that is also a prediction: whether the time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides. The nature of the required judgment explains why we have held that an agency's decision not to prepare an environmental impact statement will be set aside only if it is an abuse of discretion. E.g., *Wisconsin v. Weinberger*, 745 F.2d 412, 417 (7th Cir. 1984).

Although other courts have adopted what they conceive to be the higher standard of "reasonableness," *id.* at 417 n. 5; *Township of Lower Alloways Creek v. Public Service Elec. & Gas Co.*, 687 F.2d 732, 742 (3d Cir. 1982), we are not sure how much if any practical difference there is between "abuse of discretion" and "unreasonable." Courts dissatisfied with the "abuse of discretion" formulation are concerned that an agency whose primary mission is not the protection of the environment—an agency such as the Corps of Engineers—may tend to slight environmental concerns in deciding whether to encumber its decision-making process with an environmental impact statement. See the criticisms of the Corps in *Sierra Club v. Corps of Engineers*, 701 F.2d 1011, 1032-33 (2d Cir. 1983); *Sierra Club v. Sigler*, 695 F.2d 957, 962-63 n. 3 (5th Cir. 1983), and *Manatee County v. Gorsuch*, 554 F. Supp. 778, 783-96 (M.D. Fla. 1982)—but for a far more favorable view of the Corps see Andrews, *Agency Responses to NEPA: A Comparison and Implications*, 16 Natural Resources J. 301, 318 (1976).

Such a tendency is bound to make the courts more alert for abuses of discretion than they might otherwise be. But realism about the danger of abuse does not require a change in the standard of judicial review. There is plenary review and there is deferential review, and whether it is fruitful to attempt fine gradations within the second category may be doubted, though there is no need to resolve our doubt here.

However the standard of review is worded, it is clear that the issue for us is not whether National Marine Service's barge fleeting facility was (and will again be, if we reverse) an unfortunate eyesore, marring one of the few remaining spots of essentially unspoiled natural beauty on the Mississippi River in the general vicinity of St. Louis; undoubtedly it is that (see Figure 2 at end of opinion). It is not whether we, if we were the Army Corps of Engineers, would have denied the permit. It is whether the Corps exceeded the bounds of its decision-making authority in concluding that the fleeting facility would not have so significant an impact on the environment as to require a more elaborate study of environmental consequences.

In so stating the issue, we assume either that the Corps' action in granting the permit was "major" or that "major" adds nothing to "significant." Although the criteria have been treated as distinct in this circuit, see, e.g., *Assure Competitive Transportation, Inc. v. United States*, 635 F.2d 1301, 1308-09 (7th Cir. 1980), no court has embraced the peculiar suggestion (rejected in *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1321-22 (8th Cir. 1974) (en banc)) that an action that might have a grievous impact on the environment would not require the preparation of an environmental impact statement if the action was in some sense minor. Indeed, the "minor" action (implying few benefits) that may cause major environmental harms is a prime candidate for requiring such a statement; if the cost of preparing such a statement deters the action, there is little lost, and much gained. It seems best not to speculate further on the

meaning of "major," but to assume that the Corps' action in authorizing the fleeting facility was major and to move directly to the issue of significant impact.

Here we can get little help either from administrative regulations (such as 40 C.F.R. § 1508.27, the ambiticus but nondirective effort of the Council on Environmental Quality to define "significant" impact) or from precedent. So varied are the federal actions that affect the environment—so varied are the environmental effects of those actions—that the decided cases compose a distinctly disordered array, as shown by Professor Rodgers' illuminating comparison of cases in which environmental impact statements were, and were not, held to be required. See Handbook on Environmental Law 756-61 (1977). There we read for example that an environmental impact statement is required for a government loan to build a golf course and park but not for a mock amphibious assault by a battalion of marines on a state park, or for a train shipment of nerve gas, or for certain exploratory mining operations. See *id.* at 758, 760-61.

Although the heterogeneity of the cases makes generalization difficult, we find some evidence in the recent cases of a loosening of the judicial reins on agency decisions not to require environmental impact statements. See, e.g., *City of Aurora v. Hunt*, 749 F.2d 1457 1468 (10th Cir. 1984) (new approach procedure for Denver airport); *City of New York v. Department of Transportation*, 715 F.2d 732, 741-52 (2d Cir. 1983) (regulations for transporting large quantities of radioactive materials by highway); *Township of Lower Alloways Creek v. Public Service Elec. & Gas Co.*, *supra*, 687 F.2d at 746-49 (expansion of a pool for storing spent fuel from nuclear reactor). Judge Friendly's interesting suggestion, made in dissent in 1972, that the meaning of "significant" be fixed at the lower end of the spectrum that runs from "not trivial" to "momentous," *Hanly v. Kleindienst*, 471 F.2d 823, 837, 839 (2d Cir. 1982) (dissenting opinion)—an approach never followed in this circuit, see, e.g., *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 524 F.2d 225, 231-32 (7th Cir. 1975);

First National Bank of Chicago v. Richardson, 484 F.2d 1369 (7th Cir. 1973)—was the product of a time when environmental impact statements were less formidable than they have grown to be, when federal agencies were less sensitive than they mostly are today to environmental concerns, and, perhaps most important, when environmental assessments involved a less elaborate procedure for determining whether there was so significant an environmental impact as to warrant the preparation of an environmental impact statement. One of the things Judge Friendly was complaining about was his brethren's stepping up the requirements for such assessments, see 471 F.2d at 836; today, for good or ill, environmental assessments are thorough enough to permit a higher threshold for requiring environmental impact statements. We note in this connection that the number of environmental impact statements filed by all federal agencies fell by 50 percent between 1978 and 1983. See Council on Environmental Quality, *supra*, at 333 (tab. A-81). And finally there is growing awareness that routinely requiring such statements would use up resources better spent in careful study of actions likely to harm the environment substantially. See *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 858 (9th Cir. 1982).

Turning at last to the facts of this case, we note first that the Corps has the advantage over us of having heard live testimony from neighbors of the proposed facility and of being able to gauge the intensity as well as sincerity of the opinions expressed. An agency is not required to hold a public hearing before preparing an environmental assessment, see 40 C.F.R. § 1506.6(c), but if it does its decision is entitled to greater weight. The Corps also winnowed through hundreds of written submissions, which it could evaluate in light of the oral statements, as we cannot. The Corps also has a fund of knowledge and experience regarding the Mississippi River that judges of a federal court of appeals cannot match. Although the plaintiffs make fun of the Corps' remark that some people would enjoy a chance to see barges from close up, some

people did testify that they would enjoy this, and we cannot say that the Corps was unreasonable in believing them and in giving some weight to their tastes, however unrefined those tastes may seem to people who prefer natural to commercial vistas. And even if that testimony is wholly disregarded, it is still the case that whether a 1,500 foot line of barges, though undoubtedly an eyesore in a place of natural beauty, represents so significant a degradation of the environment as to require the Corps to prepare an environmental impact statement is a sufficiently close question to prevent us from substituting our judgment for the Corps'.

The Mississippi is not a wilderness area. There is heavy barge traffic, and National Marine's shipyard half a mile above the proposed facility. The facility will not be a shipyard, a dry dock, or a glue factory, but an aquatic parking lot—there will be little noise and little emission of fumes. It will be temporary, and will be removed without leaving any damage to the scenic properties of the area. Cf. *City & County of San Francisco v. United States*, 615 F.2d 498, 503 (9th Cir. 1980). The closest residence is three-fifths of a mile from the site. Considering all these facts we cannot say that the aesthetic impact of the facility alone was such that the Corps was unreasonable to regard the impact as insignificant. Aesthetic objections alone will rarely compel the preparation of an environmental impact statement. Aesthetic values do not lend themselves to measurement or elaborate analysis. See *Maryland-National Capital Park & Planning Comm'n v. U.S. Postal Service*, 487 F.2d 1029, 1038-39 (D.C. Cir. 1973). The necessary judgments are inherently subjective and normally can be made as reliably on the basis of an environmental assessment as on the basis of a much lengthier and costlier environmental impact statement. The fact that there was public opposition to the fleeting facility cannot tip the balance. See, e.g., *Town of Orangetown v. Gorsuch*, 718 F.2d 29, 39 (2d Cir. 1983). That would be the environmental counterpart to the "heckler's veto" of First Amendment law.

There is more to this case than aesthetics, but the other environmental effects are trivial indeed. There are no marinas or launch ramps for small boats in the vicinity of the proposed facility, and as the river is very wide at this point (almost a half mile) there is no danger of obstructing small (or for that matter large) boats. The loss of 1,500 feet of the shoreline to fishermen is unimportant since there is plenty of room elsewhere along the shoreline for fishing. There is no beach. The visual impact of the moored barges on joggers using a path along the Great River Road hardly deserves mention. Nor was the Corps required to give weight to the harm to the mussels—affecting as is the tale of how they will be smothered by the silt stirred up by the propellers. These mussels are not an endangered species, or even a sport fish. They live in beds owned by private persons who can do with the mussels what they want, including selling them for catfood or making buttons out of their shells or for that matter burying them in silt. Should it turn out that the barge fleeting facility kills any mussels—though there is no suggestion that this happened during the 18 months that the facility was in operation before the district court enjoined it—National Marine Service will be liable in damages in an action for nuisance brought by owners of the mussel bed.

The catfish provide a more difficult question because people fish for them; unlike the mussels in their beds, the catfish are not owned by anybody until they are caught. Although the fleeting facility will discourage catfish from scavenging beneath the barges, the fraction of Alton Lake occupied by the facility when it is full up with barges—five acres out of thousands—is minute; there is no reason to believe that catfish are significantly affected by so small a reduction in their stamping grounds. And catfish, of course, are not an endangered species—indeed, they are farmed extensively. Although the Fish and Wildlife Service opposed the fleeting facility, the Corps of Engineers was just required to hear the Service out, as it did—not to agree with it.

The plaintiffs also complain that the Corps failed to consider the cumulative effects of having many fleeting facilities in the general area of the one proposed by National Marine Service. Since any subsequent applicant for such a facility will have to get a Corps of Engineers permit too, the Corps will be able to prevent the problem from getting out of hand. The concern with cumulative effects seems anyway pretty academic since by the time any proposal for another fleeting facility in Alton Lake is processed, National Marine Service's temporary permit will have expired. In considering whether to renew it (should renewal be sought), the Corps will of course be required to consider any other proposal for a fleeting facility that is then pending before it. There were some other applications for permits for fleeting facilities pending at the time the Corps approved National Marine Service's, but they were either geographically remote from National Marine's site, or have been withdrawn, or both.

The plaintiffs' final complaint that we need consider (the others are insubstantial) is that the Corps of Engineers failed to explore alternative sites for the facility. Section 102(2)(E) of the National Environmental Protection Act requires the agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 40 U.S.C. § 4332(2)(E). This requirement is independent of the question of environmental impact statements, and operative even if the agency finds no significant environmental impact. E.g., *Nucleus of Chicago Homeowners Ass'n v. Lynn*, *supra*, 524 F.2d at 232. For nonsignificant impact does not equal no impact; so if an even less harmful alternative is feasible, it ought to be considered. But the smaller the impact, the less extensive a search for alternatives can the agency reasonably be required to conduct. *City of New York v. Department of Transportation*, *supra*, 715 F.2d at 744. National Marine Service had made a study of alternative sites and found

none suitable. The Corps was entitled not to conduct a further study of alternatives unless the plaintiffs were prepared to shoulder the burden of showing that National Marine had overlooked some plausible alternative site—and they were not. The Corps is not a business consulting firm. It is in no position to conduct a feasibility study of alternative sites on the Mississippi for a barge fleeting facility, a study that would have to both evaluate National Marine Service's business needs and determine the availability of the necessary permissions from the owners of riparian land at the various sites. The Corps has to depend on the parties for such information, and National Marine Service's submission was unrebutted.

The judgment of the district court is reversed with directions to vacate its injunction and dismiss the suit.

Fig. 1

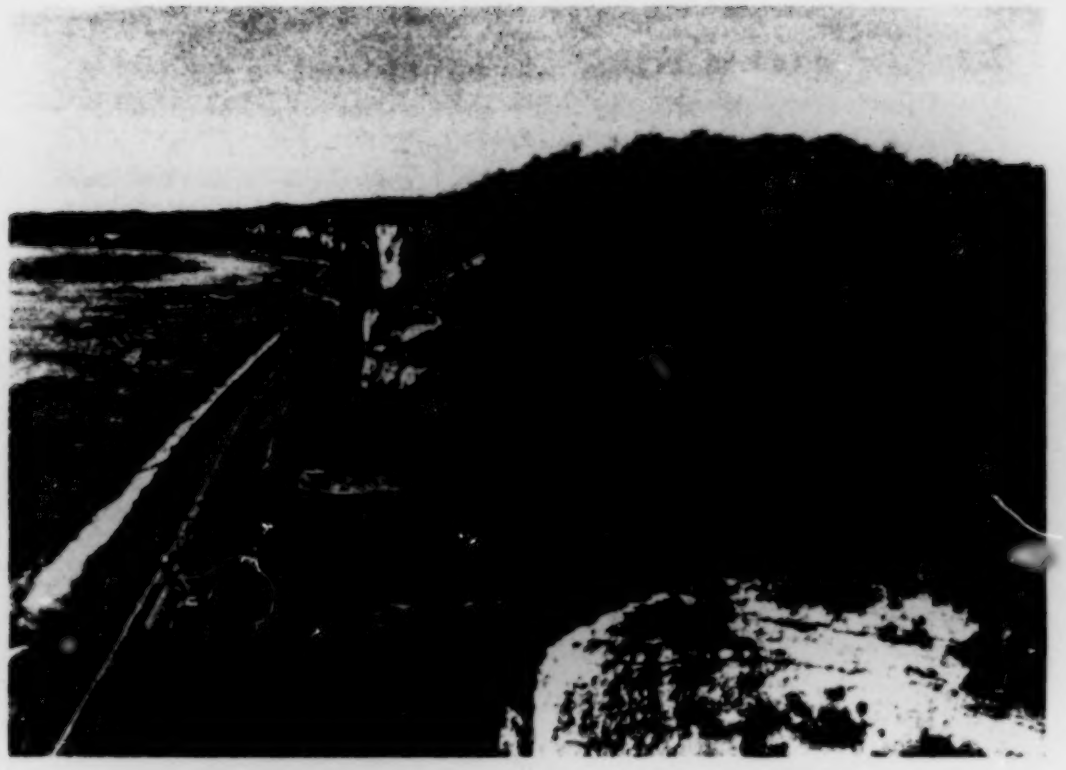

Fig. 2

WOOD, *Circuit Judge*, dissenting. Some of the enjoyment that thousands of people derive from this unique scenic area on a small bit of the Illinois shore of the Mississippi River is being sacrificed and the area damaged without sufficient justification for the financial benefit of a private commercial company.

Judge Beatty, the trial judge, knows this territory. He does not need to rely on a stagnant record and pictures to appreciate the diverse and adverse impact which will result from this commercial intrusion into this living park-like area. We should not therefore, in keeping with the spirit of *Anderson v. City of Bessmer, North Carolina*, 53 U.S.L.W. 4314 (March 19, 1985), so lightly toss his findings over the side. We should begin with them even if, as the majority says, they were prepared for him. Judge Beatty found that "the Corps has failed to take the 'hard look' required to support its conclusions, and has failed to document that 'hard look' in the Environmental Assessment, Findings of Fact and Finding of No Significant Impact, in violation of 42 U.S.C. Sec. 4332(2)(C) [NEPA] and the applicable regulations." Specifically, Judge Beatty held that the Corps' Finding of No Significant Impact was arbitrary and capricious because: the Corps inadequately considered the fleeting facility's impact on aesthetic values and recreational activities; the Corps excluded from consideration the cumulative impact of existing and foreseeable barge fleeting operations on Alton Lake; the Corps did not take a "hard look" at the facility's potential impact on the mussel bed and over-wintering catfish and did not give adequate weight to the views of the U.S. Fish and Wildlife Service and Illinois Department of Conservation; and the Corps inadequately evaluated the degree to which the fleeting operation's effects on the quality of the human environment are likely to be highly controversial, as required by 40 C.F.R. § 1508.27(b)(4). In addition, the court held that the Corps, and I believe this to be particularly significant in this case, violated section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E), and implementing regulations by failing to "study, develop, and describe appropriate alternatives."

The majority opinion pays little heed to Judge Beatty's findings preferring to recast the issue and then to proceed with its own de novo consideration of the problems. The majority's newly framed issue is "whether the Corps should have prepared an environmental impact statement." Judge Beatty did not need to reach that question. He found only that the required initial step, the preparation of the Environmental Assessment, was inadequate to base the finding of No Significant Impact. The Corps, he found, did not take the "hard look" at the environmental consequences required by *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). The majority, in response to its recast issue, raises the spectre of the Corps being required to produce, as in some other case, an environmental impact statement, possibly of 858 pages, and separate appendices requiring an expenditure of thousands of dollars. This, it says, would be economically unfeasible for a routine permit, 14,000 of which the Corps receives in a year. There is no need, however, for economic alarm as that is not this case.

The Corps produced an Environmental Assessment about the length of this opinion. Judge Beatty found, apart from the brevity of the Assessment, that the Corps only went through the motions. The Corps' soft, not hard, look may have been considered sufficient since the commercial intrusion was to be only temporary. Like many projects, however, it is less temporary now than it was originally. The latest forecast we have is that the time for completion of the new lock, to which this commercial intrusion is tied, has now been extended to 1988. This commercial permit supposedly would expire at that time.

I differ with the majority not only on what the issue on appeal is, but also with its view of the various environmental elements. I come to a conclusion generally supporting Judge Beatty's findings, a few of which will be commented on briefly.

A. Aesthetics.

To the Corps a thing of real beauty and professional enjoyment will be the new lock when it is completed, not the bluffs and river. That can be excused since the Corps, after all, is made up of professional and talented engineers, not artists, nature lovers, catfish fishermen, bikers, hikers, symphony directors, picnickers, joggers, local residents, students, or tourists driving peacefully along the Great River Road.

The Great River Road along the Mississippi River bank was created by Congress in 1973 to provide the public with access to the river's scenic views and recreational activities. The State of Illinois cooperated by acquiring scenic easements, including a scenic easement adjacent to this particular proposed commercial site.[1] That particular scenic easement and others nearby will now be good for an unobstructed view of barges, about the most uninteresting things afloat, not nearly as interesting to many as a piece of floating driftwood. For any barge enthusiasts there may be, as has been suggested, the heavy barge traffic and extensive commercial barge operations elsewhere along the river shore should provide more than ample barge-viewing opportunities. There is some concern that the Mighty Mississippi River will become in time the Mighty Mississippi Barge Canal. I doubt that the Museum of Science and Industry in Chicago would care to have one of the barges on display, even temporarily.

The majority measures the visual obstruction and impact of this commercial permit area only by the length of six barges in a row which a motorist going 40 mph would pass in 25 seconds. Some motorists, I think, would drive faster than that just to get past the barges. You can

[1] To appreciate the many activities this Great River Road Project offers, citizens may write to the Division of Tourism, Department of Commerce and Community Affairs, 227 South College, Springfield, Illinois 62706 for a copy of *Great River Road, Illinois*.

see the barges, tugboats, and related activity, however, on your approach long before you get there as you look up or down the river.

There is also an impact on the two little historical towns of Chautauqua and Elsah, but they are dismissed by the majority since they are between 1.5 and 4.0 miles downstream. Elsah is a charmer, a bit of the 1800's nestled in a little valley on the bank of the Mississippi River.[2] Since 1973 Elsah has been listed in the National Register of Historic Places. Principia College is within walking distance. Fortunately this commercial barge operation will not be at the foot of Elsah's main street, but nevertheless it is in Elsah's and Chautauqua's neighborhood. Neighborhoods have their own character and what harms part of a neighborhood harms it all. It is about the same as rezoning a residential area in order to permit some company to establish a gas station in the middle of it. The adverse impact on the whole neighborhood is greater than the mere width of the gas station lot.

B. Recreational Activities.

The area's recreational activities are deemed trivial by the majority, but that is not so for others, including that lonely jogger. The sport fisherman is said to be affected by this commercial barge facility for no more than the 1500 feet width of the site. Fishermen well recognize that finding to be at least a fishing error, if not a legal error. The boat and barge traffic coming and going to the facility from all angles stirring up the water and silt and the attendant noise and activity will extend well beyond the site's 1500 feet frontage. The fishermen, at least while they are fishing, are ordinarily a quiet lot for they know that you do not throw rocks in the water to attract fish.

The mooring area is not considered by the majority to be an obstruction to navigation, but the Corps conceded

[2] To understand and appreciate this rare little town, its people, and homes, see *Better Homes and Gardens, Country Homes*, September/October, 1984 which is devoted primarily to Elsah.

that it is. In any event the commercial barge traffic coming and going in all directions from the main river channel to this five acres of water will be a hazard for amateur boaters.

There are many ways that the enjoyment and use of this area will be affected, but we cannot pursue them all here.

C. Aquatic Life.

One of the largest mussel beds known to be in the upper Mississippi touches this commercial site. These mussels, according to the majority, at best are good for cat food and buttons. The Attorney General of Illinois, with help from the Illinois Department of Conservation, as can be seen from his brief, however, holds the lowly mussel in higher esteem.

> Mussels play several important roles in the riverine ecosystem including serving as a food source for certain birds and several species of fish. Mussels also provide a substrate for supporting numerous organisms such as algae, flatworm, leeches, and other mollusks which in turn serve as a food source. As filterfeeders, mussels reduce the amount of impurities in the water and serve as a valuable scientific tool providing important information regarding the presence of pesticides, heavy metals, and other pollutants in the river. It is uncontroverted that the mussel bed at this site has been productively harvested commercially for many years.

As for the bewhiskered catfish, the majority finds that he will only be minutely affected by being discouraged from scavenging beneath the barges. Not so. The actual concern is that the river bottom underlying and near this site where the tugboats will be approaching and maneuvering may provide potentially irreplaceable overwinter habitat for catfish which they need to survive. The majority apparently is not concerned since catfish, after

all, it notes, are also farmed.[3] True, but there is still a substantial catfish harvest in the river. In 1977, for instance, the harvest ranked first monetarily in the upper Mississippi. And, there are still a few people left who enjoy fishing along the bank with a cane pole, worm, and a red striped bobber.[4]

The barge operation is characterized by the majority as a static maritime parking lot with little activity, almost a pastoral scene. It is much more. It will be a mooring site, but there will be activity in assembling tows and their tugboats. Some of these tugboats develop 5,000 horsepower. It has been estimated that a single tow passage can move 2,700 pounds of sediment into nearby marshes and downriver creating turbidity that can last for several hours. Tugboats maneuvering at the site will have a scouring effect on the bottom causing injury to the mussels, fish, and plant life. With continuous turbidity

[3] The Illinois Department of Conservation, Division of Fisheries, Springfield, Illinois 62706, in a publication, *Potential of Catfish Farming in Illinois*, by Al Lopinot and Ray Fisher, begins with this background and words of caution:

> In recent years, successful catfish farming in Arkansas and Mississippi has aroused considerable interest. Both states are in the heart of the catfish farming belt as is Illinois in the corn belt. The potentials for catfish farming in Illinois are *very* limited because of the short growing season, lack of economical water supplies, and unexplored markets for the higher priced domestic product.
>
> To enter the catfish farming business requires suitable land for pond construction, an ample supply of water, a market for the fish, and technical know-how. Technical knowledge cannot be overemphasized—too many popular articles neglect this important issue, resulting in bankruptcy for many "rookie" catfish farmers. In addition, the potential farmer will need suitable financial backing and a license from the state in order to sell the fish.

[4] In the past year friends of mine fishing the tributaries have caught catfish weighing over 30 pounds, which even though it does little to help this case, at least has the makings of good fish stories.

fish and plant life and bottom fauna have little chance of surviving. This is one way things not now on the endangered list can get there.

The special conditions of the Corps' permit itself, intended to assuage environmental concerns, belies the majority's static view of this commercial site. Only "major repairs" are prohibited, so the site may be used for repairs considered less than major, whatever they may be. Work barges, anchor barges, fleet barges, derelicts and sunken vessels cannot be permanently moored at the site. They may be moored there temporarily, however long "temporarily" may be. Another interesting special Corps' condition requires minimization of the use of searchlights and noise from bullhorns and machines at the site, whatever that "minimization" may be. Residents along the river might adopt a little self-help by pulling down their window shades at night to obstruct the powerful searchlights. I have nothing to suggest, however, about how to minimize a bullhorn. That all tells us too that this new commercial area, even at night, will not be quiet and peaceful.

Conclusion.

I have expressed these different views of the environmental situation, not to substitute my judgment for the Corps, but to suggest that these considerations should have been enough to prompt the Corps, at least, to take a genuine "hard look" and to say to the company, "There are too many people and environmental problems in this special River Road area. Let's see if we can't locate a suitable alternative site. Other barge companies have found them so you probably can too somewhere up or down this big river where environmental harm can be minimized. It may be a little less economical or convenient for you, but after all, it is, as you say, only temporary."

Judge Beatty found the Corps did not comply with section 102(2)(E), 42 U.S.C. § 4332(2)(E) which requires the Corps to study, develop, and describe appropriate

alternatives.[5] The majority correctly states that this alternative requirement is independent of the question of an environmental impact statement which we have been considering, and is operative even if the agency finds no significant environmental impact. It is also stated by the majority that the company did make a study of alternate sites and found none to its liking. Permitting the company by itself and for itself to find and propose an alternate site less convenient for its pocketbook is a little like consulting the fox about the best location for the chicken house. The district engineer for the Corps, however, agrees that alternate sites could be found, but opted unfortunately to let this commercial enterprise into this "park" for the operational efficiency of the company and reduced fuel consumption.

The majority holds that the Corps, in spite of the statute and regulations, was entitled to accept the company's view of alternate sites. The alternative site burden is unloaded on those citizens or organizations who express environmental concerns. The Corps, the majority says, is not a business consulting firm, and the Corps would have to evaluate the company's business needs. Also the Corps would have to determine whether permission could be secured from owners at the alternate sites. That burden does not and should not lie with the concerned citizens who are now being held in default by the majority for not doing what the Corps and the company should have done. In any event section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E), provides that the Corp "shall study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." That was not seriously done and it should have been.

In this case, I would, as Judge Beatty did, leave the question open for the Corps, if it desires, to take the

[5] 33 C.F.R. §§ 209.410(d)(1)(ii) & 230.5(e), 33 C.F.R. App. B, P.8(a), and 40 C.F.R. §§ 1500.2(e) & 1501.2(c) also require consideration of alternatives.

required "hard look." If a new look, but this time a "hard look" is to be taken, I would direct that special emphasis be given to alternative sites because of the unique circumstances of this special area. With a little encouragement from the Corps the company would soon find a suitable substitute area although it would be its second choice. It would, after all, be only temporary, and temporary works both ways, so the economic impact on the company of an extra mile or two should not be devastating. The impact on the company, in any event, would be a great deal less than even the temporary impact of its private commercial activities on the environment and the many citizens who could enjoy this area, a very rare area in this part of the world.

I must therefore respectfully dissent.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 17, 1985.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*

Nos. 84-1689 and 84-2045

RIVER ROAD ALLIANCE, INC., et al.,
Plaintiffs-Appellees,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, et al.,
Defendants,

AND

NATIONAL MARINE SERVICE INCORPORATED,
Defendant-Intervenor-Appellant,

AND

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,

vs.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,
Defendants.

Appeals from the United States District Court for the Southern District of Illinois, Alton Division.

Nos. 82 C 5285 and 83 C 5071

Judge William L. Beatty.

This cause was heard on the record from the United States District Court for the Southern District of Illinois, Alton Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and with instructions, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 8, 1985.

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

RIVER ROAD ALLIANCE, INC., et al.,
Plaintiffs-Appellees,

Nos. 84-1689, 84-2045 v.

CORPS OF ENGINEERS OF UNITED STATES ARMY, et al.,
Defendants-Appellants,

NATIONAL MARINE SERVICE, INC.,
Defendant-Intervenor-Appellant.

Appeals from the United States District Court for the Southern District of Illinois, Alton Division.
Nos. 82 C 5285, 83 C 5071
William L. Beatty, *Judge.*

ORDER

On May 31, 1985, plaintiff-appellee People of the State of Illinois filed a petition for rehearing with suggestion for rehearing *en banc*, and on June 17, 1985, plaintiffs-appellees River Road Alliance, Inc., et al., also filed a petition for rehearing with suggestion for rehearing *en banc*. A majority of the judges on the original panel have voted to deny the petition*, and a majority of the active judges have not voted to grant rehearing *en banc*.** The petitions for rehearing with suggestion of rehearing *en banc* are therefore DENIED.

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* Circuit Judge Harlington Wood, Jr. voted to grant the petition.

** Circuit Judges Bauer, Wood, Cudahy, Coffey and Ripple voted to grant rehearing *en banc*.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

RIVER ROAD ALLIANCE, INC., et al., *Plaintiffs,* -vs- CORPS OF ENGINEERS OF THE UNITED STATES ARMY, et al., *Defendants.* and NATIONAL MARINE SERVICE, INC., *Intervenor-Defendant.*	No. 82 5285
and PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff,* -vs- UNITED STATES ARMY CORPS OF ENGINEERS, et al., *Defendants.*	No. 83 5071

SUMMARY JUDGMENT

These two causes have been consolidated by the Court for hearing and decision on motions for summary judgment.

National Marine Service, Inc., ("National Marine") is the successor to a company which applied to the Corps of Engineers for a permit to conduct barge fleeting operations on the eastern shore of Alton Lake, at Grafton, just below the mouth of the Illinois River, pursuant to Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. Sec. 403. After a public hearing the Corps granted National Marine Permit No. P-1425 on October 4, 1982. Both suits challenge that permit, claiming violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. Sec. 4321 *et seq.*, and applicable regulations.

In No. 82-5285, plaintiffs River Road Alliance, Inc. and others (the "River Road plaintiffs") brought suit against the Corps of Engineers and various officials of the Department of Defense (the "federal defendants") for declaratory and injunctive relief. National Marine intervened as a defendant. The amended complaint sought declaratory and injunctive relief against National Marine, as well. The dispute also concerns other permits which either are under consideration or have been granted by the Army Corps of Engineers for barge fleeting activities in Alton Lake. After filing what was stated to be the "administrative record," the federal defendants moved for summary judgment, and National Marine also moved for summary judgment. Plaintiffs requested that summary judgment be entered against the moving parties.

In No. 83-5071 the People of the State of Illinois brought suit against the Corps of Engineers and certain officials of the Department of Defense. The People also moved for summary judgment.

Having examined the briefs and affidavits and administrative record, and having heard the argument of counsel, and being fully advised in the premises, the Court finds that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

THE FACTS

There is a dam on the Mississippi River at Alton, Illinois, a few miles upstream from the City of St. Louis, and from the junction of the Missouri River with the Mississippi River. The dam forms a pool, or reservoir, extending for several miles upstream, beyond the junction

of the Mississippi River with the Illinois River. This pool, sometimes referred to as the Alton Pool or Pool 26, is commonly known to the people of the Greater St. Louis Metropolitan Area as Alton Lake.

On the eastern side of the Lake, close to the shoreline, are bluffs of extraordinary beauty. Between the bluffs and the lake is located the Great River Road. All parties agree with the Corps' statement that these "bluffs and river areas at and downstream of applicant's worksite provide some of the most impressive and unique vistas of any area along the Mississippi River." Vo. I, Transcript, p.224. Intervenor National Marine specifically is "in full accord in acclaiming the unique attractiveness of these areas adjacent to [National Marine's] worksite." Id. at 252.

Located with a metropolitan area with a population of more than 2½ million people, Alton Lake has become the most intensively used pool on the Mississippi River. On its perimeter are many pleasure boat marinas, private duck hunting and fishing clubs, picnic grounds, fishing sloughs, archeological sites, public access areas, and wooded river banks and wetlands occupied by wild life.

The permitted fleeting area, which extends 1500 feet along the shore covering 5 acres of water surface, is situated adjacent to a part of the Great River Road constructed by the State of Illinois during the late 1960s and early 1970s to increase public access to the natural beauty of the Mississippi River and its bluffs along the Illinois shore. The Great River Road, which in its entirety parallels the Mississippi River from its origin in Minnesota to the Gulf of Mexico, is a component of the National Scenic Highway System. 23 U.S.C. Sec. 148; Ill. Rev. Stat. 1983, Ch. 121, P.3-104.3 and 4-201.15(b). A bicycle path accompanies the Great River Road along the bluffs overlooking Alton Lake.

Through the condemnation of property and purchase of scenic easements, public funds have been expended to preserve the natural beauty of the area affected by Permit P-1425. *See* the Beautification Act of 1965, 23 U.S.C.

Sec. 319; Ill. Rev. Stat. 1967, Ch. 121, P. 4-201.15(a) (now Ill. Rev. Stat. 1983, Ch. 121 P.4-201.15(a)); *Department of Public Works and Buildings v. Keller*, 61 Ill.2d 320, 335 N.E.2d 443 (1975). The property condemned in *Department of Public Works, supra*, is immediately adjacent upstream to the National Marine fleeting site, and other property adjacent to and near the site is subject to scenic easements.

The Villages of Chautauqua and Elsah are located within one-and-a-half and four miles, respectively, of the fleeting site. Elsah was listed in the National Register of Historic Places at the time the application for Permit P-1425 was submitted. 16 U.S.C. Sec. 470(a)(1). Chautauqua was nominated for listing several months before the Corps issued an Environmental Assessment in this matter and was placed on the National Register prior to the permit's issuance.

U.S. Fish and Wildlife Service ("USFWS") and Illinois Department of Conservation ("IDOC") objected to issuance of the permit, asserting that it will adversely affect the largest mussel bed in the upper Mississippi, located at the proposed fleeting site. USFWS stated that the mussel population of the Alton Pool has drastically declined. USFWS also warned that there is an important catfish overwintering area located at the fleeting site, that overwintering areas are crucial to the maintenance of existing populations of catfish, and that the proposed fleeting will have serious consequences for the catfish.

Numerous organizations, public officials, and private citizens, including plaintiff New Piasa Chautauqua (owner of the Village of Chautauqua), expressed great concern over the adverse impacts of the proposed barge fleeting on the scenic, cultural, recreational and wildlife values of the area.

APPLICABLE STATUTE AND REGULATIONS

The Corps' power and authority to authorize activity in navigable waters pursuant to the Rivers and Harbors Act is circumscribed by the National Environmental Policy Act, 42 U.S.C. Sec. 4321 *et seq.* ("NEPA"). Section 102(2)(C) of NEPA, 42 U.S.C. Sec. 4332(2)(C), requires that for all "major federal actions significantly affecting the quality of the human environment," the responsible federal agency must prepare a detailed statement, generally known as the Environmental Impact Statement ("EIS"), on the environmental impacts of the proposed action and its long-term ramifications. In this instance the Corps declined to prepare an EIS, and instead issued its Finding of No Significant Impact.

In reviewing this determination that no significant impact will result from the operations to be permitted, the role of the Court "is to insure that the agency has taken a 'hard look' at environmental consequences . . ." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21. If the Corps fails to take the requisite "hard look," the determination of the Corps is arbitrary and capricious, in violation of NEPA.

Numerous regulations implement this statute. The Corps is required to prepare an Environmental Assessment, and any Finding of No Significant Impact is to be based on the information analyzed in the Environmental Assessment. 33 C.F.R. Sec. 230.10. In those documents and any Findings of Fact, the Corps must assess the impact of the proposed activity on all aspects of the quality of environment, 33 C.F.R. Sec. 209.410(e)(7)(i); include a brief discussion of the need for the proposed action, its environmental impacts, alternatives to the proposed action and other matters, 33 C.F.R. Sec. 230.9(c); and "present the reasons why the action will not have a significant impact on the quality of the human environment." 33 C.F.R. Sec. 230.10. In so doing, the Corps should "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement," and include brief

discussions of the need for the proposal, of alternatives, and of the environmental impacts of the proposed action and alternatives. 40 C.F.R. Sec. 1508.9.

While paying lip service to the statute, the Corps has failed to take the "hard look" required to support its conclusions, and has failed to document that "hard look" in the Environmental Assessment, Findings of Fact and Finding of No Significant Impact, in violation of 42 U.S.C. Sec. 4332(2)(C) and the applicable regulations cited above. The Corps' Finding of No Significant Impact is arbitrary and capricious in that:

1. The Corps did not take a hard look at the aesthetic impact of barge fleeting on this unique national and regional scenic resource, and did not examine whether the introduction of an industrial use is consistent with governmental actions previously taken to preserve the area's great natural beauty. The Corps also failed adequately to evaluate the aesthetic impact on the historic villages of Chautauqua and Elsah.

2. The Corps did not take a hard look at the impact of industrial barge fleeting at this site on recreational activities.

3. The Corps has excluded from consideration the cumulative impact of Permit P-1425 in relation to existing and reasonably foreseeable barge fleeting operations in Alton Lake. The Corps has disregarded the regulations of the Council on Environmental Quality, 40 C.F.R. Sec. 1508.7 and 1507.27(b)(7).

4. The Corps did not take a hard look at the potential impact of the proposed fleeting operations on the mussel bed and the overwintering catfish area located at the fleeting site, and did not give adequate weight to the views of the United States Fish & Wildlife Service and the Illinois Department of Conservation.

5. The Corps did not adequately evaluate the degree to which the effects on the quality of the human en-

vironment of the barge fleeting operation are likely to be highly controversial, notwithstanding 40 C.F.R. Sec. 1508.27(b)(4).

In addition, the Corps must comply with the other requirements of NEPA, specifically the requirement of Sec. 102(2)E, 42 U.S.C. 4332 (2)(E), that, in respect to any proposal which involves unresolved conflicts concerning alternative uses of available resources, the Corps must study, develop and describe appropriate alternatives to recommend courses of action. A detailed consideration of alternatives is also required by 33 C.F.R. 209.410(d)(1)(ii), 33 C.F.R. Sec. 230.5(e), and App. B. P. 8(a), and 40 C.F.R. 1500.2(e) and 1501.2(c). The Corps violated this statute and these regulations in failing to study, develop or describe any alternatives.

33 C.F.R. Sec. 320.4 sets out general policies the Corps must follow in reviewing permit applications under the Corps' various jurisdictional statutes, including Section 10 of the Rivers and Harbors Act. The Corps violated 33 C.F.R. Sec. 320.4(a)(1), 320.4(a)(2)(ii), 320.4(a)(2)(iii), 320.4(c), 320.4(e), and 320.4(j)(2) by failing to consider all relevant factors, the practicability of reasonable alternatives, and the long-term impact of the activities, by failing to give weight to the views of USFWS and IDOC, and by failing to consider the impact on officially recognized historic, scenic and recreational values, and local public interest factors, respectively.

Plaintiffs in both cases have requested a declaratory judgment that the permit was unlawfully granted because no Environmental Impact Statement was prepared, and the River Road plaintiffs have requested an injunction against re-issuing a permit without preparing an Environmental Impact Statement. The ruling herein makes it unnecessary to reach the issue whether an EIS must be prepared. To the extent that the complaints seek such relief, they are dismissed without prejudice. If the Corps should reopen the application proceeding in the future, and conduct a new hearing, and issue a new permit, without preparing an Environmental Impact Statement, the claim will be open for review here.

The River Road plaintiffs have requested declaratory relief respecting violations of numerous other statutes, Executive Orders, and regulations, and a permanent injunction forbidding the Corps to grant any of the pending permit applications relating to Alton Lake. It is unnecessary to reach those issues at this time. To that extent the River Road complaint is dismissed without prejudice.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Court enters its Declaratory Judgment that the issuance of Permit No. P-1425 is arbitrary, capricious, an abuse of discretion, and not in accordance with law, and is therefore invalid.

2. Permit No. P-1425 is declared null and void and is hereby set aside, vacated, and held for naught.

3. Effective ten (10) days after the date of this order Intervenor-defendant National Marine Service is hereby restrained and enjoined from conducting barge fleeting activities at the permitted site unless and until a valid permit is issued.

4. National Marine is ordered to remove its mooring system and any appurtenances installed by authority of Permit No. P-1425 not later than thirty (30) days after disposition of appeal, whichever is later.

5. The proceeding is remanded to the Corps for further consideration. In the event that further proceedings are held, the federal defendants are hereby ordered to comply fully with the spirit and the letter of the statutes and regulations cited herein.

6. This order disposes of all claims asserted except the claim of the River Road plaintiffs for fees and expenses, and therefore constitutes a final judgment within the meaning of the Equal Access to Justice Act, 28 U.S.C. Sec. 2412(d)(1)(B).

7. In No. 82-5285, pursuant to 28 U.S.C. Sec. 2412(a), costs are taxed in favor of plaintiffs, one-half against the federal defendants and one-half against intervenor-defendant National Marine. In No. 83-5071, costs are taxed in favor of plaintiff against defendants. Plaintiffs' bills of costs may be submitted within thirty (30) days of entry of this order.

DATED: This 20th day of April, 1984.

/s/ William L. Beatty
United States District Judge

NOTE: CLERK TO SEND COPIES TO ALL PARTIES.

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT	SOUTHERN DISTRICT OF ILLINOIS
RIVER ROAD ALLIANCE, INC.	Docket Number 82-5285 and 83-5071
v.	
CORPS OF ENGINEERS OF UNITED STATES ARMY and NATIONAL MARINE SERVICE	Name of Judge or Magistrate WILLIAM L. BEATTY

X *Decision by Court.* This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
That judgment is entered in favor of plaintiff and against defendants. (See order)

/s/ M. Ruth Brooks
Deputy Clerk

Date April 20, 1984

DISPOSITION FORM

Reference or Office Symbol	Subject
LMSOD-F	Environmental Assessment

To	From	Date
OD-F File (P-1425)	DE	30 October 1981 Snow/3-5703/AS-WA/1643

1. Riverway Towing Company, P. O. Box 308, Foot of Oak Street, Grafton, Illinois 62037, has applied for a Department of the Army permit to construct a barge fleeting area along the left bank of the Mississippi River near Grafton, Jersey County, Illinois, approximate mile 217.3, Upper Mississippi River. Applicant's proposal will be processed under the provisions of Section 10 of the River and Harbor Act of 1899. Applicant has applied to the Illinois Department of Transportation for a state permit. Since the proposed work does not include the placement of dredged or fill material below ordinary high water, certification in compliance with Section 401 of the Clean Water Act is not required.

2. Applicant's proposed fleeting area will extent approximately 1,500 feet in length along the left bank. Anchor fleet will consist of two 8,000-lb. bow anchors, each with 270 feet of anchor chain. Anchor chains will be supported with mooring buoys. Fleet size will be limited to 30 barges. Applicant's plans are attached.

3. Applicant's proposal has been reviewed by appropriate members of my staff. Construction, operation and maintenance of the proposed fleeting facility has been evaluated with respect to anticipated effects on natural resources and other matters of public interest.

Conservation: Natural areas in and around the Mississippi River are gradually being cleared for agricultural, commercial, industrial or residential developments. Applicant's proposal is not expected to accelerate the loss of natural areas. Establishment of barge fleets does not require construction of land-based support facilities, nor does the fleeting activity encourage the development of docks and terminals.

Aesthetics: Although an evaluation of the aesthetic value of any area is necessarily subjective, bluff and river areas at and downstream of applicant's worksite clearly provide some of the most impressive and unique vistas of any area along the Mississippi River. In the opinion of some individuals, the presence of Riverway's proposed fleeting facility, or any similar intrusion into the natural setting, would be aesthetically objectionable. Other individuals welcome the opportunity afforded by the Great River Road for a closeup view of towboats and barges. In addition to the static visual effect of moored barge fleets, a fleeting operation also presents a view of normal activities on the waterway as small push boats work to move barges in and out of fleets during the disassembly and assembly of large tows. In any event, the aesthetic impairment, or enhancement, should be minimal since Riverway's fleet will be limited to the length of six barges. If a motorist were proceeding along Great River Road at a rate of 40 miles per hour, a fleet six barges long would obstruct his view of the river for less than 25 seconds.

Water Supply: Applicant's proposed fleet, either individually or in combination with existing fleeting facilities, would not produce a significant effect on the quality of water available for industrial, municipal and other uses, nor impair operation of existing water intake facilities. The nearest water intake downstream of Riverway's proposed fleeting site is at mile 209.5 on the right bank, and at mile 204.2 on the left bank.

Water Quality: The operation of fleeting facilities in shallow areas probably involves the resuspension of bottom strata by slightly increasing stream velocities and by propeller wash created by push boats working the fleets. The resuspension of bed materials obviously increases turbidity at the fleet which extends a short distance downstream. Based on sampling and testing performed by the St. Louis District in connection with its dredge disposal operations, increases in turbidity would not extend more than 200 feet downstream of the fleet. The possibility of

water quality effects by accidental spills at fleeting facilities cannot be entirely eliminated. However, the provisions of applicant's lease prohibit the fleeting of barges carrying gasoline, petroleum products, chemicals and other hazardous materials. Applicant's proposal is not expected to produce a significant effect on water quality.

Recreation: Pool 26 is used extensively by the public for power boating, water skiing, sailboating, fishing and other water-related recreational activities. However, no marinas or launching ramps have been constructed in the vicinity of Riverway's proposed fleeting facility, and small boats generally do not operate near the site because of possible damage by rock revetment along the left bank. The principal recreational effect of applicant's proposal will be to eliminate, or impair, bank fishing for a distance of approximately 1,500 feet, and for this same distance, the moored fleet will not provide a full view of the river from the Great River Road. Overall, the effect on recreational activities is minimal.

General Environmental Concerns: The operation of a fleeting area generates relatively low levels of air pollution (diesel engine exhaust) and low to moderate levels of noise created by engines, loud speakers and the clanging of tools on steel decks. Operations at night also involve use of searchlights which are considered a nuisance by some individuals. These operational effects would produce very little impact in the area proposed by applicants since the proposed fleeting site is approximately .6 mile from the nearest residence, and developments near the site are limited to Riverway's existing fleet immediately upstream, and a rock quarry almost directly landward. The St. Louis District has received no objections from the public concerning excessive levels of pollution, noise or other environmental damage by Riverway's existing fleet.

Historic Values: The proposed fleeting facility will result in no known effect on archaeological sites nor on any historical landmark listed in the National Register of Historic Places. The nearest registered landmark is at

Elsah, Illinois, approximately 4 miles downstream. The village of Chautauqua, approximately 1½ miles downstream, has recently been nominated for registration, but its eligibility to date has not been determined. Applicant's proposal is not expected to affect the village of Chautauqua.

Endangered Species: The American bald eagle is the only endangered species that is known to inhabit the area. The Illinois Natural History Survey has informed my staff that water and shoreline areas adjacent to Riverway's proposed fleeting site do not constitute important habitat for the bald eagle. The nearest important habitat is located along the Missouri shore near Portage Island, approximately 2 miles downstream of applicant's site. A study performed for SCNO by Dr. Thomas C. Dunstan, Associate Professor of Biology at Western Illinois University, indicates that fleeting facilities have no effect on bald eagles and will not jeopardize their continued use of an area. I conclude that the bald eagle will not be significantly affected by Riverway's proposal.

Mussel Beds: During the processing of P-1425 and P-1426, the US Fish and Wildlife Service and the Illinois Department of Conservation expressed concern about possible damage to a mussel bed lying along the Illinois shore downstream of Riverway's proposed fleeting facility. In response to those concerns, Riverway elected to perform a mussel survey in the area. The survey was performed by Riverway's consultant, Midwest Aquatic Enterprises, Mahomet, Illinois, during July 1981. The survey indicates the mussel bed generally extends from miles 217.1 to 215.8. A total of 381 mussels were collected from miles 217.3 to 215.8, only 13 of which were taken above mile 217.1. No federally listed endangered mussels were collected during the survey. From the known distribution of *Lampsilis Higginsi*, its occurrence in a mussel bed near Grafton, Illinois is unlikely.

Given the number of existing impacts (commercial harvesting, passing tows, pollution), consultant does not ex-

pect additional impacts to result from establishment of Riverway's proposed fleeting facility.

St. Louis District has reviewed consultant's report and, in general, we concur in consultant's survey techniques and assessment procedures. However, we are uncertain that the mussel bed will be unaffected by bed materials resuspended by pushboats during fleeting operations. The consultant's report is currently under review by the IDOC and USFWS. Based on the recommendations of the reviewing agencies, the pending permit, if issued, will contain special conditions for the protection and/or monitoring of the mussel bed.

FINDING OF NO SIGNIFICANT IMPACT (FONSI)

I have considered and analyzed a wide range of possible impacts that could result from applicant's proposal. In attempting to fully identify all possible effects, the St. Louis District employed a variety of techniques to obtain comments and data pertinent to applicant's proposal. A large volume of information was received in response to two public notices circulated to approximately 500 individuals, agencies and groups. Additional valuable comment was obtained from area residents and others attending a public hearing at Pere Marquette State Park on 18 December 1980.

On the basis of our review of applicant's proposal, including consideration of all comments offered by interested parties, I do not expect issuance of pending Department of the Army permit P-1425, subject to proposed limitations and special conditions, will significantly affect any facet of the human environment. Accordingly, I have determined, as provided by Appendix B, ER 200-2-2, that the Environmental Impact Statement will not be filed for the pending Department of the Army permit.

/s/ Robert J. Dacey
Colonel, CE
Commanding

FINDINGS OF FACT FOR PENDING DEPARTMENT OF ARMY PERMIT (P-1425)

1. *Application for Department of the Army permit:*

a. *Description of Work Requiring Department of Army Approval:*

An application by Riverway Towing Company for a Department of the Army permit to construct, operate and maintain fleeting facilities along the left bank of the Mississippi River downstream of Grafton, Illinois, approximate mile 217.3, Upper Mississippi River, has been evaluated by the St. Louis District. The proposed fleeting area will extend 1,500 feet in length along the left bank and will consist of two 8,000 lb. bow anchors, each with 360 feet of anchor chain. Anchor chains will be supported with mooring buoys. Tie-off wires will be shackled into the anchor chains. Fleet size will be limited to 30 barges. Applicant indicates the proposed facilities will be used for temporary fleeting of barge tows which must stop at Riverway shipyards for repair or servicing of damaged barges. Approximately 8 months a year, the new facilities will also be used for general fleeting, if space is available. Construction of the new facilities is subject to approval under Section 10 of the River and Harbor Act of 1899. In accordance with regulations published at 33 CFR 320 through 325, I have reviewed and evaluated, in light of the overall public interest, applicant's proposal as well as the stated views of other interested agencies and the concerned public, relative to the proposed work in navigable waters of the United States.

b. *Sale of Riverway's Shipyard at Grafton, Illinois to National Marine Service, Inc.:*

On 30 September 1981, National Marine Service informed the St. Louis District of the purchase of Riverway Shipyard facilities at Grafton, Illinois. Riverway Towing Com-

pany confirmed the sale in a letter dated 1 October 1981. In letter dated 9 November 1981, I requested that National Marine Service review the application and all subsequent information furnished by or on behalf of Riverway at the public hearing, and in post-hearing correspondence. In letter dated 1 December 1981, National Marine Service confirmed that construction, operation and maintenance of proposed additional fleeting facilities at Grafton, Illinois would be in full compliance with all commitments and representations made by Riverway Towing Company during our processing of P-1425. Accordingly, our records have been revised to show National Marine Service is now the applicant for P-1425. Inasmuch as all public comments in the matter address "Riverway's" proposal, we will generally refer to the applicant in these Findings as "Riverway/National Marine" in order to avoid confusion. However, the terms "Riverway" and "National Marine" will also be used where appropriate.

2. *Coordination with Federal, State and Local Agencies, Environmental Groups and General Public*:

In processing applicant's proposal, all probable consequences of the proposed work were examined in order to insure that public issues would be identified and addressed. Factors bearing on my review include conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage protection, land use classification, navigation, recreation, water supply, water quality, energy needs, safety, food production, and in general, the needs and welfare of the people. In the evaluation process, applicant's proposal to establish additional fleeting facilities was subjected to normal public review procedures as follows:

a. *Pre-hearing Comments and Statements*:

Riverway/National Marine's proposal to establish fleeting facilities along the Great River Road near Grafton, Illi-

nois, was preceded by a similar proposal by SCNO Terminal, Inc. to construct fleeting facilities immediately downstream near Chautauqua, Illinois. In the two-mile stretch of river between the two towns, SCNO has requested authorization to install fleeting facilities along 8-tenths of a mile of shoreline, Riverway/National Marine proposes to install fleeting facilities along 3-tenths of a mile of shoreline, and the remaining 9-tenths mile of shore would remain open. Public notices for the SCNO proposal were circulated by the Illinois Department of Transportation and St. Louis District on 24 September and 14 October 1980, respectively. In response to our solicitation of comments for SCNO's proposal, strong objections to proposed fleeting along Great River Road, including the proposed Riverway/National Marine site, were submitted by interested parties. Responses included 10 letters expressing support for the Riverway/National Marine application, 5 letters expressing objections to both the Riverway/National Marine and SCNO proposals, and another 25 letters expressed opposition to *any* fleeting along Great River Road. Twenty-seven respondents requested a public hearing be held. In addition, we received petitions signed by approximately 1,000 petitioners who requested a hearing and offered objections to fleeting along Great River Road. A list of respondents is attached, Exhibit 1.

b. *"Notice of Public Hearing" dated 19 November 1980*:

On the basis of concerns expressed in response to our public notice for the SCNO application, P-1426, the St. Louis District and the Illinois Department of Transportation determined that a joint public hearing would be held to consider the SCNO and Riverway/National Marine applications. The hearing announcement, dated 19 November 1980, invited attendance or representation by all parties who might wish to express their views concerning either or both proposals.

c. *"Public Hearing" 18 December 1980*:

The hearing was held jointly by the State of Illinois and the Corps at Pere Marquette Lodge, Pere Marquette State Park, Illinois. Approximately 300 people were in attendance including representatives of Federal and state agencies, environmental groups and local citizens. An attendance list appears in Exhibit 3. The hearing consisted of two sessions, the first of which addressed Riverway/National Marine's proposal. Following a brief recess, SCNO's proposal was considered in the second session. During the hearing, comments were accepted on all issues which might conceivably bear on the issuance of the pending Federal and state permits. A total of 76 participants presented arguments and facts, 10 of which addressed Riverway/National Marine's proposal, 26 addressed SCNO's proposal, and 40 addressed both proposals. Parties speaking in favor of the proposals cited economics and fuel and operational efficiencies as the basis for their position. Unqualified support for the fleeting facilities proposed by Riverway/National Marine was expressed by the mayor and City Council of Grafton, Illinois; the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; and various towing and shipping interests.

Those who expressed opposition to the proposals spoke of the natural beauty of the river and bluffs along Great River Road which would be both marred and obstructed by the presence of barges moored along the shore. Objectors also contend that barge fleets along Great River Road would result in reduced tourism, environmental damage due to noise, fumes and search lights, and damage to a mussel bed.

d. *Post-Hearing Statements*:

In closing the hearing, both agencies announced that hearing participants would be allowed to submit supplemental information and statements until 15 January 1981. In response to a request submitted jointly by Senator

Charles Percy and Congressman Paul Findley, I granted a further time extension for the public comment period, which expired at close of business on 17 February 1981. A total of 174 letters were received during the post-hearing comment period. One respondent expressed opposition to Riverway/National Marine; 8 opposed SCNO; and 134 recommended further study, modification or rejection of both proposals. Nine respondents expressed support for Riverway/National Marine, 5 supported SCNO and 17 indorsed both proposals.

e. *Summary of Issues Identified by the Public, with Comments by the District Engineer*:

Our concurrent processing of two separate and distinct proposals by Riverway/National Marine (P-1425) and SCNO Barge Line (P-1426) resulted in a large volume of public comment, much of which addressed both proposals but neither in particular. An abstract of comments furnished by each individual and organization at the public hearing and in post-hearing correspondence appears in Exhibits 2 and 4, respectively. The Exhibits include comments that specifically addressed the Riverway proposal, those that address both proposals, and those that addressed fleeting in general along Great River Road. Excluded are comments received that specifically, and exclusively, addressed the SCNO proposal. Our tabulation indicates a total of 17 separate issues were identified by the public as follows:

NEED FOR ADDITIONAL FLEETING FACILITIES

Applicant explained the benefits of acquiring additional fleeting space, but some participants questioned the need for more fleeting. (Exhibit 2, page 1, comments by Alan Hauff, Slaten Bray and Mary Ann Pitchford; Exhibit 4, page 1, comments by Gary Mayes.)

District Engineer's Comment: The chronic delays for tows waiting for lockage through Lock and Dam 26 are likely to increase until the replacement structure is placed

in operation in 1987. The principal inefficiency of the small main lock at Alton is that tows with more than eight barges must perform a "double" lockage, which ties up a lock more than twice as long as a "single" lockage. Accordingly, if a tow requiring a double lockage were to tie off in a fleeting area in order to split the tow into two singles, the subsequent lockage time for both singles would be substantially less than the time required for the original double. If all upbound and downbound "doubles" were to employ "fleeting and splitting" procedures, each "double" would reduce its normal lockage time, but more importantly, the queue for all boats waiting lockage would be substantially shortened. The advantages of "fleeting and splitting" will be eliminated when the replacement Lock and Dam 26 is placed in operation since its 1,200-foot main lock will handle a 15-barge tow in a single lockage.

A full evaluation of applicant's apparent need for additional fleeting facilities *to serve the Grafton repair yard* would require a detailed understanding of the manner in which priorities are established between the towing and shipyard operations. The combined fleeting space for the towing company and the shipyard currently totals 2,500 linear feet, which compares favorably with the 3,000 linear feet of fleeting maintained by the National Marine repair facility at Hartford, Illinois. However, if the shipyard's fleeting needs are consistently assigned a low priority in relation to the growing need for general fleeting, the shipyard will continue to lose additional fleeting space, provided general fleeting increases as expected.

NAVIGATION

Navigational effects of applicant's proposal were discussed but did not become a key issue. (Exhibit 2, page 1, comments by Commander A. E. Tanos, Slaten Bray.)

District Engineer's Comment: The channel in the vicinity of the proposed fleet is more than 2,000 feet wide. I fully concur in Commander Tanos' conclusion that applicant's proposal to place a fleet no wider than six barges abreast will not create an unreasonable obstruction to navigation.

AESTHETIC VALUE OF PROPOSED FLEETING SITE

Participants, including the applicant, were in full accord in acclaiming the unique attractiveness of areas adjacent to applicant's worksite. (Exhibit 2, pages 1 and 2, comments by Alan Hauff, Glennon Tockstein, Brian Cunningham, Dr. David VanWinkle, Mark Hall, Richard Ouderkirk, Mrs. G. W. Haxel and John Browning; Exhibit 4, pages 2 and 3, comments by Richard Worthen, Richard C. Bauer, Thomas Holzberlein, Deanne Holzberlein, Merilyn Holzberlein, JoAnn Stade, Paul A. Hock, Ronald V. Wendle, G. H. Gavin, Mr. and Mrs. R. Bayless, W. Robert Rogger, Mr. and Mrs. R. J. Sauer, W. A. Christiansen, Gerald Beckerman, Mrs. Bill Evans, and Nancy A. Heinze.)

District Engineer's Comment: It is apparent that many local residents, weekend sightseers and out-of-state tourists consider that the Great River Road between Grafton and Alton provides natural vistas that are unsurpassed.

AESTHETIC IMPAIRMENT BY FLEETING

Many participants both explicitly and implicitly addressed the potential damage to the aesthetic value of the national scenic highway. (Exhibit 2, page 3, comments by Glennon Felch, Judy Felch, Brainerd Ripley, Dr. David VanWinkle and John Browning; Exhibit 4, pages 3-8, comments by Robert and Laura Rawe, Martha E. Cunningham, Mrs. Marjorie Fisher, H. G. Rollins, David Thomas, Patty Wille, Joe A. Meisel III, Mr. and Mrs. Harland Speer, Ralph J. Hood, Mrs. Joseph Voss, Gordon Grundmann, Mrs. Patricia Laffler, David A. Berkel, Charles F. Hobbs, James Green, David C. Arnold, Mrs. Wallace R. Gilbert, John Madson, David F. Stevens, John D. Spencer, Vernon B. Randall, Irene Holmer, Mr. and Mrs. Richard Herbst, Mr. and Mrs. John M. Buese, Helen Graves, C. B. Rippley, Karl J. Taglier, C. Robinson, Mr. and Mrs. John H. Stade, Mrs. Clara M. Stockenberg, Mrs. Mary Street, Barbara Minnell, Mary Hoffman, Mrs. Richard

Moser Jones, Betty Callies, Marvin Gibelman, Edward D. Selvey, Jr., Nancy A. Heinze, Linda Meisel, Helen Farnen, William Frazier, Gladys Owsley, Lance Bursac, Congressman Paul Findley-Senator Charles Percy, Bernard Fischer, David Arnold, Ralph Eisenbath, James D. O'Hane, Jr., Helen and Dudley Shaw, Gwen Norval, Barbara Ruf, Alan L. Winfield and Oletha Brunk.)

District Engineer's Comment: The fleeting of 30 barges downstream of an existing fleet will obviously be aesthetically displeasing to some individuals. The aesthetic impairment will be limited, however, since applicant's new fleet will occupy less than five percent of the more than seven miles of completely unobstructed shoreline that extends from Piasa Creek upstream to Riverway/National Marine's existing fleet. Aesthetic impairment is also diminished by placement of the fleet at the extreme upper end of the scenic bluffs that extend along the river from Alton to Grafton.

RECREATION

Some concern was expressed from the standpoint of use of Pool 26 by recreational craft. (Exhibit 2, page 3, comments by Donald Funderburk and C. D. Stine; Exhibit 4, pages 8-10, comments by Robert Schmidt, Martha E. Cunningham, Patty Wille, Mr. and Mrs. Thomas Nelson, Jr., Dorothy J. Gore, Martin A. Voss, Emmett B. Drescher, James W. Fletcher, Laurence R. McAneny, Marjory Gilbert, David A. Berkel, William Larson, William Edmunds, Richard S. Jaenson, Mr. and Mrs. John H. Stade, Charles Hobbs, D. Wisha, James M. Fabian, Clement Mulligan and Forrest Stroup.)

District Engineer's Comment: Applicant's proposed fleeting site has no unique value to recreationists since the site contains no sand beach, nor does it provide launching or mooring facilities for small boats. Applicant's proposal is not expected to significantly affect recreational use of Pool No. 26.

ECONOMIC ISSUES

A substantial number of conflicting views were expressed concerning the economic impacts of applicant's proposal. (Exhibit 2, pages 4 and 5, comments by Alan Hauff, Randall Wolter, Mary Ann Pitchford, Glennon Tockstein, James Swift, M. Painter, Robert St. Peters, Bert Seago, Robert Freeman, Gary Sorgia, Jim Delaney and Michael Northway; Exhibit 4, pages 11-14, comments by Jonathan Lehmann, Dorothy Gore, Mrs. James T. White, Homer M. Adams, Martin A. Voss, Bob Wille, Dorothy Buerkle, W. L. Cordes, Leonard Gardner, Richard C. Bauer, Woodrow W. Drescher, George Wadleigh, Robert Stafford, Clyde W. Cope, Richard J. Davidson, JoAnne Davidson, 41 petitioners through Alan F. Hauff, Mr. and Mrs. Kenneth H. Edwards, Ethel Goetz, Mr. and Mrs. David Bishop, Mr. and Mrs. Armond Bishop, Harold Apel, Paul Helgesdorf, Sam Zangori, Walter Bohn, Helen Farnen, Congressman Paul Findley-Senator Charles Percy, Gary Mayes and Alan Hauff.)

District Engineer's Comment: The local economic issues addressed by both proponents and opponents of applicant's proposal do not appear to be particularly significant. The principal economic factor is that a fleeting site on Pool No. 26, if properly operated, can result in savings of time and money for the towing industry until the replacement Lock and Dam project is operable. These savings can be expected to produce a favorable economic effect at the state and national levels.

The contention that 124 to 145 jobs could be lost if the permit is not granted must be viewed as a very remote possibility. If, in fact, insufficient fleeting space becomes critical to the survival of the shipyard, one solution would be for the shipyard to prohibit use of the existing fleeting facility for normal fleeting of transient tows and barges. The towing company could then move its fleeting operation to another location with no serious effects except that some cost benefits, such as opportunity to share tug service with the shipyard, might be lost. Ar-

guments that applicant's proposed fleet would diminish tourism dollars must also be viewed as extremely remote. Westbound motorists on the Great River Road are enroute to Grafton, or to Pere Marquette Park, or to Calhoun County; and eastbound motorists are enroute to Elsah or to Alton or to St. Louis. These motorists, by and large, will not elect alternate routes to their destinations in order to avoid the visual impact of a 1,500-foot fleeting facility. In fact, it should be expected that the Great River Road will retain its standing as one of the most popular scenic attractions in the metropolitan St. Louis area, given its natural advantages over alternative attractions available to the public.

POLLUTION, NOISE, FIRE, GENERAL ENVIRONMENTAL EFFECTS

Some participants expect substantial effects due to pollution, noise, lights and industrialization; others expect little or no effects; and still others expect improvements over existing conditions. (Exhibit 2, pages 5 and 6, comments by Alan Hauff, Randall Wolter, M. Painter, J. Bryan Collester, J. Keehner, Dr. David VanWinkle, T. Delaney, Gary Mayes and Mrs. Richard Ouderkirk; Exhibit 4, pages 14-16, comments by Southern Illinois Industrial Council, Mrs. Marjorie Fisher, Martha E. Cunningham, Mr. and Mrs. Thomas E. Nelson, Jr., Dorothy J. Gore, Mrs. Betty Hollman Clark, Bob Wille, Patte Wille, R. V. Gerber, James M. Nelson, Stephen L. Graham, Brad Westre, Helen Thatcher, David C. Arnold, Howard A. Hausafus, John F. and Janet S. Hampton, Amanda H. and John H. Rodgers, Mary O. Hungerford, Marcia McClinton, J. Bryan Collester, Byron L. Farrell, Harold L. Volkmer, Gary Mayes and Elmer Shannon.)

District Engineer's Comment: With respect to general environmental disturbances produced by fleeting operations, applicant's proposed fleet should produce no significant effects. The proposed fleeting site is approximately .6 mile from the nearest residence, and developments near the site are limited to applicant's existing fleet immediately upstream and a rock quarry almost directly landward. Noise, fumes and use of searchlights may be noticeable by motorists, hikers and cyclists traveling the Great River Road, but the level of annoyance should be no greater than that which is produced at Riverway/National Marine's existing fleet. The St. Louis District has received no complaints from the general public about Riverway's past fleeting operations. Incidents in which fires occur on fleeted barges are extremely rare.

INCREASED CONGESTION ALONG ILLINOIS SHORE

Concern was expressed that approval of the pending permit would increase congestion of tows waiting to lock through Lock and Dam 26. (Exhibit 2, page 6, comment by J. Felch.)

District Engineer's Comment: Applicant's proposal is not expected to significantly affect the congestion of tows that periodically develops along Great River Road. Increased congestion along the Illinois shore could only occur when tows awaiting lockage at Alton are backed up to or above applicant's proposed fleeting site. A backlog of such size occurs only two or three times a year for a total period of two to three weeks.

ENERGY

Proponents of the additional fleeting facility anticipate substantial fuel savings will be realized if applicant's proposal is approved. Opponents made no contentions on the issue. (Exhibit 2, page 7, comments by Randall Wolter, Darwyn Nelson and Louis Koeller; Exhibit 4, page, 16, comment by Leonard Gardner.)

District Engineer's Comment: With respect to applicant's barge repair activities, the proposed fleeting site would produce fuel savings over any other site since it is within the minimum practicable distance from the repair facilities. The secondary use of the proposed fleeting facility is for

the fleeting or barge tows to allow smaller push boats to take the barges through Lock and Dam No. 26, thus freeing the line towboat for a return trip. It is expected that some fuel savings would be achieved when the locking queue is long and the shuttle boat has a full load of barges in both directions. Minimal, or possible negative, fuel savings can be expected when the locking queue is short and when the shuttle locks through "light boat" in one direction.

GREAT RIVER ROAD/SCENIC EASEMENTS

Opponents objected to any loss of the aesthetic resource since construction of the Great River Road and the acquisition of scenic easements were paid for with public funds. (Exhibit 2, pages 7-8, comments by Mary Ann Pitchford, Robert St. Peters, Judy Felch, Brian Cunningham and Robert Edmonds; Exhibit 4, comments by Emmett B. Drescher, Bob Wille, Ralph J. Hood, G. W. Haxel, Senator John C. Danforth, James C. Roberts, Mrs. Patricia Laffler, Philip Child, Homer M. Adams, Martin A. Voss, Dorothy J. Gore, James M. Nelson, Mr. and Mrs. Thomas E. Nelson, Jr., William R. Thomas, Jr., Mr. and Mrs. Harland Speer, Joseph Voss, Mrs. Betty Hollman Clark, H. G. Rollins, Margaret Middlecoff, Robert and Ann Fischer, Robert P. and Imogene Chevalley, Robert C. Manion, Mr. and Mrs. R. C. Pearce, Charles N. Grandy, Dr. Robert L. Allen, Dale L. Klohr, Kevin F. Blaine, Joseph A. and Patricia L. Miller, Dr. Harry Kircher, Mrs. W. Clark Doak, Margaret W. Flint and Mr. and Mrs. A. Lyndon Bell.)

District Engineer's Comment: The "National Scenic Highway" extends along the left bank of the Mississippi River from Alton, Illinois upstream to Grafton, Illinois. The upper nine miles of the scenic highway, which includes the section adjacent to Riverway/National Marine's proposed fleeting facilities, provides a continuously unobstructed view of the river from Piasa Creek upstream to its upper terminal at Grafton. Any significant impairment of the aesthetic value of areas along the highway would obviously diminish the benefits of Federal and state funds expended to make the scenic area available to the public by construction of the Great River Road.

However, Riverway/National Marine's proposal would not constitute a violation of the scenic easements acquired by the State of Illinois. The easements apply only to specified areas lying landward of the landward edge of the Great River Road.

ENDANGERED SPECIES

Several participants addressed the issue of possible adverse effects on the American Bald Eagle. (Exhibit 2, pages 8-9, comments by Mrs. Mary Bresler, Donna Hart, Ralph Shook and Max Griffith; Exhibit 4, pages 20-22, comments by Mr. and Mrs. Thomas E. Nelson, Jr., Dorothy J. Gore, Mrs. James T. White, Robert and Laura Rawe, Martha E. Cunningham, Bill Evans, George German, Elmer Shannon, Gary Mayes, Marvin Gibelman, Pete Dignan, and Mr. and Mrs. John Prokovich.)

District Engineer's Comment: The American bald eagle is the only endangered species that is known to inhabit areas adjacent to the worksite. In December 1980, Dr. Thomas C. Dunstan, Associate Professor of Biology at Western Illinois, was retained by SCNO Terminal Corp. to comment on possible effects on wintering bald eagles that could be expected from operation of a fleeting facility along the Great River Road. The area of interest to SCNO lies immediately downstream of the proposed Riverway/National Marine fleeting site. On 15 December 1980, Dr. Dunstan visited SCNO's proposed fleeting site and observed eight eagles perched along the adjacent cliffs and vegetated slopes. None of the perched eagles were flushed when four different towboats moved upstream past the site. Based on his on-site observations, supplemented by other data he has compiled during 13 years of research on wintering eagles, Dr. Dunstan concludes that the operation of fleeting facilities along Great River

Road will have no effect on bald eagles and will not jeopardize their continued use of the area. Dr. Dunstan's conclusions are consistent with the findings of my technical staff.

MUSSEL BEDS

Concern was expressed that applicant's proposal would create potential damage to an existing mussel bed. (Exhibit 2, page 9, comment by Robert Schanzle; Exhibit 4, pages 22-24, comments by Patty Wille, Mr. and Mrs. Thomas E. Nelson, Brian C. Cunningham, Mrs. Marjorie Fisher, Martha E. Cunningham, Richard Worthen, Alfred Talbert, Donna Hart, Donald J. Sprinot, M. Celeste Little, Tom Saunders, Congressman Paul Findley-Senator Charles Percy, David Kenney and Gary Mayes.)

District Engineer's Comment: In response to concerns expressed at the hearing and in subsequent correspondence, applicant elected to perform a mussel survey in the area of its proposed fleeting facility. The survey was performed by a consultant, Midwest Aquatic Enterprises, Mahomet, Illinois, during July 1981. The survey indicates the mussel bed generally extends from miles 217.1 to 215.8. A total of 381 mussels were collected from mile 216.3 to 215.8, but only 13 of which were taken above mile 217.1. The consultant reports that commercial clammers do not work above mile 217.1 because population densities are so low. No federally listed endangered mussels were collected during the survey. From the known distribution of *Lampsilis higginsi*, its occurrence in a mussel bed near Grafton, Illinois is unlikely.

The consultant's findings are summarized as follows:

o The mussel bed is currently subject to periodic siltation as evidenced by the small population of mussel species intolerant of silt.

o Nearly all (99.5%) of the mussel population would be likely to tolerate some increases in siltation. One species might be eliminated.

o Moderate siltation could eliminate another six species, reducing the population to about one-half its present level.

o Heavy siltation could eliminate virtually all of the mussel species.

o Consultant does not expect, on the basis of existing flow patterns, that any bed materials resuspended in fleeting area would be deposited on the mussel bed.

o Given the number of existing impacts (commercial harvesting, passing tows, pollution) consultant does not expect additional impacts to result from establishment of applicant's proposed fleeting facility.

St. Louis District has reviewed consultant's report and, in general, we concur in consultant's survey techniques and assessment procedures. However, we do not share consultant's expectation that bed materials resuspended in the fleeting area will somehow be conveyed across the river for deposit along the Missouri shore. Under low flow or "flat pool" conditions, a slow but consistent migration of bed materials almost *directly downstream* is more likely. If the permit is granted, it will require that permittee repeat the mussel survey after the facility has been in operation for two years.

SEEK ALTERNATE SITE

Applicant described efforts to find alternative sites. Other participants urged that an alternative site should be found and approved. (Exhibit 2, page 9, comments by Alan Hauff, Darwyn Nelson, Robert Chase, Donald Spencer, Mrs. Richard Ouderkirk and George Wadleigh; Exhibit 4, pages 24, 28, comments by Edward R. Levitz, Laurence R. McAneny, Brian C. Cunningham, Robert L. Schmidt, Joseph Voss, Mrs. Joseph Voss, Jonathan Lehmann, Mrs. G. W. Haxel, Dorothy R. Buerkle, Gordon Grundmann, Martha E. Cunningham, Mrs. Bill Evans, Mrs. Betty Hollman Clark, Charles Hobbs, R. V. Gerber, Wilbur J. Larson, Marjory N. Gilbert, James D. Robertson, Harry and Verna Rogers, Maxine C. Allen, Mary Ann Pitchford,

Mrs. F. Edward Ince, Mrs. James Howard, John D. Kerr, Robert L. Middlecoff, Carl F. Bensiek, Ralph M. Shook, Mary Ann Pitchford, Blanche C. Darnell, N. D. Timmermeier, Jim Reilly, Vince Demuzio, Gary Mayes, Mr. and Mrs. Andrew Bylinowski, and Mrs. F. R. Yeager.)

District Engineer's Comment: In my judgment, efforts by Riverway and SCNO to find alternative fleeting sites prior to submitting their permit applications were not sufficiently broad or thorough. SCNO subsequently submitted an application for a fleeting facility at the Portage Des Sioux power plant. Interested parties expressed no opposition to the Portage Des Sioux site, and I issued a permit for SCNO's proposed fleet on 2 December 1981.

Similarly, we believe several prospective fleeting sites could be found as alternatives to Riverway/National Marine's proposed site at Grafton. However, siteing considerations for Riverway/National Marine are more stringent than for SCNO since the primary objective of Riverway/National Marine's proposal is to provide additional fleeting for the repair facility. The Grafton site offers advantages over any alternative sites in terms of operational efficiencies and reduced fuel consumption, but we do not concur in applicant's conclusion that alternative sites do not exist.

NEED FOR ENVIRONMENTAL IMPACT STATEMENT

Several participants expressed their view that an EIS should be prepared for the pending Federal action. (Exhibit 2, page 10, comments by Brian Cunningham, J. Keehner, Robert Freeman and Ralph Shook; Exhibit 4, pages 28-30, comments by Charles Hobbs, Brian C. Cunningham, Richard L. Purdy, William R. Thomas, Jr., Martin A. Voss, James and Harold Roberts, Martha E. Cunningham, H. R. Rollins, Margaret Middlecoff, Mr. and Mrs. Thomas E. Nelson, Jr., Bob Wille, Robert and Ann Fischer, Joe A. Meisel III, Edward R. Levitz, Mrs. Patricia Laffler, Robert C. Manion, Stephen L. Graham,

May Edmunds, William and Pat Aksamit and David Kenney.)

District Engineer's Comment: My conclusion that preparation of an Environmental Impact Statement for Riverway/National Marine's proposal is not warranted is addressed in paragraph 5 of this memorandum, and in an environmental assessment dated 30 October 1981.

PREPARE MASTER PLAN FOR POOL 26

Several post-hearing respondents recommended a master plan for Pool 26 be developed before any permanent fleeting permits are issued. They suggested the plan be developed with participation by environmentalists, recreational groups, communities like Chautauqua and Elsah, barge lines and governmental representatives. Two individuals suggested no permits be issued until the UMRBC master plan is available. (Exhibit 4, pages 30-32, comments by Mrs. Patricia Laffler, Robert P. and Imogene Chevally, Betty Lee Thomas, Elsie and A. Lyndon Bell, Martin A. Voss, H. G. Rollins, Margaret Middlecoff, Bob Wille, Robert and Ann Fischer, Joe A. Meisel III, Martha E. Cunningham, James and Harold Roberts, Philip S. Child, Lucille B. Schmidt, Pat and Bill Aksamit, Senator Charles Percy-Congressman Paul Findley, Elizabeth S. Hood, Brian C. Cunningham, Ralph J. Hood and Charles Hobbs.)

District Engineer's Comment: The Corps currently has no authority to develop or implement multi-use plans for private lands abutting Pool 26. Our authority to regulate use of such lands is limited to those activities that are subject to approval under Department of the Army permit programs. Department of the Army permits are required for proposed construction and work performed below ordinary high water, and for placement of dredged and fill materials into wetlands adjacent to the waterway. Lands in private ownership adjacent to Pool 26 have a total shoreline length of 204 miles, approximately four times greater than the length of government-owned shoreline. I am uncertain that the development of a comprehen-

sive multi-use plan for all lands adjacent to Pool 26 would contribute to the public interest. Since matters of national and interstate significance can be effectively regulated through our regulatory programs, any additional controls that may be needed, in my judgment, should be imposed by state, county, municipal, or other local entities. The St. Louis District would be available to assist such local entities in the development of multi-use plans for private lands along Pool 26, *provided* appropriate representatives of the areas to be zoned specifically request our participation. I received several suggestions that we postpone action on applicant's proposal until a master plan to be prepared by the Upper Mississippi River Basin Commission, under the provisions of P.L. 95-502, has been approved by Congress. I am unable to concur in those suggestions although the final UMRBC master plan is complete, it should be noted that Section 101(b) Public Law 95-502 provides that the *final master plan shall not be implemented without the express approval of the plan by an act of Congress.* Any effort on my part to apply the UMRBC master plan, especially in view of the explicit prohibition against implementation of such a plan prior to congressional review and approval, would be totally inconsistent with my responsibility to administer a fair and reasonable regulatory program.

FISH AND WILDLIFE RESOURCES

Divergent views were expressed by members of the public concerning the effects of fleeting on fish and wildlife resources. (Exhibit 4, page 32, comments by James W. Fletcher, W. L. Cordes, George German, Emmett B. Drescher and Mrs. Deborah A. Palfreeman.)

District Engineer's Comment: If applicant's proposal is approved and implemented, approximately five acres of water surface will be covered by a moored fleet of 30 barges. Along with this loss of exposed surface area, there will be a concomitant loss of light available for phytoplankton production. Such an impact may not be significant since the Mississippi River, with its normally high turbidity, probably relies more on organic debris rather than phytoplankton production as its food base. The moored fleet along with the propeller wash produced by pushboats working the fleet may tend to create disturbances of the river bottom resembling those conditions prevailing in the navigation channel. The agitation of bottom substrates during fleeting operations could result in the resuspension of sediments. Although tow traffic studies have indicated that the magnitude of resuspension can be related to tow size, speed, draft, direction of travel, engine horsepower, depth of water, and type of traffic, there is presently no quantitative data linking these factors to changes in the biota. Although applicant's proposed fleeting site affords greater water depths than prevails at most fleeting facilities (15′ to 25′ at low water, 1976 survey), some resuspension of sediment is expected to develop and result in some reduction in production of aquatic biota, but not significant reductions. Applicant will be required to periodically monitor the condition of an existing mussel bed. The extent to which the proposed fleeting facility would affect eagles, canvas back ducks, otters and other forms of wildlife has not been conclusively established. However, neither the US Fish and Wildlife Service, the Illinois Department of Conservation, nor the Missouri Department of Conservation has expressed opposition to barge fleets on the basis of potential or demonstrated effects on wildlife. A brief study performed for SCNO by Dr. Thomas Dunstan in 1980 indicates barge fleets should have no effect on bald eagles and should not jeopardize their continued use of an area. Members of my technical staff find no reason to conclude that barge fleets represent a hazard to wildlife, nor do they expect eagles and waterfowl will abandon areas adjacent to applicant's worksite due to establishment of additional fleeting facilities.

HISTORIC VALUES

Several respondents expressed confidence that the historical significance of Chautauqua would warrant its listing

in the National Register of Historic Places. (Exhibit 4, page 33, comments by Dorothy R. Buerkle, B. J. Middelton, Illinois Department of Conservation, Heritage Conservation and Recreation Service, and Law Committee of Riverroad Alliance.)

District Engineer's Comment: The proposed fleeting facility will result in no known effect on archaeological sites nor on any historical landmark listed in the National Register of Historic Places. The nearest registered landmark is at Elsah, Illinois, approximately 4 miles downstream. The village of Chautauqua, approximately 1½ miles downstream, has recently been nominated for registration, but its eligibility to date has not been determined. Applicant's proposal is not expected to affect the village of Chautauqua.

3. *Review by St. Louis District Staff*:

Applicant's proposal has been reviewed by elements of the St. Louis District staff in order to identify potential impacts on facets of the total public interest.

a. *Safety*:

(1) *Anchors and Chains*:

Anchoring systems should generally satisfy criteria recommended by the Waterways Experiment Station in a study undertaken for the St. Louis District in 1975. The WES study involved a fleet proposed in St. Louis Harbor where current flows are much stronger than in Pool 26. Application of the WES recommendations would require that Riverway/National Marine install the equivalent of three 10,000-pound Danforth anchors. St. Louis District requested that Riverway/National Marine provide an engineering assessment of its proposed anchoring system, which consists of two 8,000-pound stockless anchors with 360 feet of 2-3/8-inch chain. On 10 April 1981, applicant submitted an analysis of its proposed anchoring system which was prepared by Design Associates, Inc., New

Orleans, Louisiana. The consultant's analysis indicates the fleet will experience a maximum horizontal force of 63 kips under extreme flow conditions, approximately 30 kips below the holding capacity of the anchoring system. My staff concludes that a 30-kip margin of safety should be adequate. Maximum fleet size and maximum fleet width will be specified on the approved permit drawings. In addition, special permit conditions will be incorporated into the draft and final permit, as described in paragraph 3a.(3) of these findings.

(2) *Depth of Anchors*:

The Waterways Experiment Station study recommended that anchors be placed sufficiently deep such that anchor flukes will not become exposed by erosion of river bed. In order to satisfy that criterion, anchors should be set at a depth of 20 feet below the flat pool elevation of 419 feet NGVD.

(3) *Special Conditions to Assure Safe Fleeting Operations*:

It is uncertain that applicant's proposed anchoring systems will be adequate under all conditions that can reasonably be expected to occur in the waterway. The following special conditions will be imposed if the Riverway/National Marine proposal is authorized and constructed:

o That permittee shall insure moored fleet is continuously maintained at or below the maximum size specified on the attached plans. Consistent with prevailing stage and channel conditions, fleet shall be reduced, including complete removal of all barges, if required, to provide free and easy passage for river traffic.

o That permittee, to the extent possible, shall prevent or remove accumulation of ice and drift.

o That permittee shall reduce fleet size, or take other actions that may be necessary to prevent failure of the anchoring system under any load conditions that may be imposed by flood, ice flows, storms or otherwise.

o That in the event permittee's anchoring system fails to hold the moored fleet in position, permittee shall promptly return the anchors and anchor barge to the position authorized by this permit. Permittee shall report such incidents to the District Engineer within 24 hours, and such reports shall include an account of measures taken or proposed by permittee to prevent future incidents.

o That permittee is authorized to install additional anchors, chain, or both, to proposed anchor barge, provided such additions do not adversely affect navigation. Plans for the work shall be submitted to the District Engineer for concurrence within 5 days following such installation.

o That permittee shall limit the mooring of empty barges or take other actions that may be necessary to prevent channelward rotation of fleet under any and all conditions.

b. *Dredging and Dredged Material Disposal Operations*:

Wherever possible, dredging and disposal operations will be performed such that barge fleeting operations are not disturbed. However, the draft permit for applicant's proposed fleet near Grafton will contain a special condition as follows:

o That permittee shall temporarily remove the anchor barge and fleet, or temporarily reduce fleet, as may be necessary to minimize interference with channel maintenance dredging and disposal operations undertaken by the Corps of Engineers.

c. *Imposition of Special Conditions*:

o That permittee shall not moor barges containing materials classified as hazardous by the US Coast Guard. There materials include but are not limited to gasoline, petroleum products, chemicals and similar products.

o That permittee shall not engage in major repair or maintenance operations, loading, unloading or transferring cargo except when required to prevent a barge from sinking.

o That permittee shall not permanently moor any work barges, anchor barges or fleet barges, derelicts or sunken vessels at the site.

o That permittee shall minimize flashing of search lights on the shore and shall avoid excessive noise from bullhorns and machinery.

d. *Duration of Permit*:

The current need for Riverway/National Marine to perform "general fleeting" as opposed to fleeting required in connection with the Grafton repair facility, should diminish substantially when the replacement Lock and Dam No. 26 is placed in operation. With the reduction in general fleeting, the 2,500 linear feet of fleeting space currently maintained by Riverway/National Marine should be adequate for both "general" and "repair" fleeting requirements. The draft permit will include a special condition as follows:

o That permittee shall discontinue mooring of barges at facilities authorized by this permit following notification by the District Engineer that removal of the existing Lock and Dam No. 26 structures has progressed such that a safe and adequate bypass channel is available for barge traffic. Permittee shall vacate the site within 90 days of such notice and shall restore the area to the satisfaction of the District Engineer.

4. *Other Considerations*:

a. *Illinois Department of Transportation Permit*:

Riverway had applied to the Illinois Department of Transportation for a State of Illinois permit in accordance with the provisions of the Illinois Rivers, Lakes and Streams Act. However, on 16 September 1981, new legislation was enacted by the State of Illinois, amending the Act as follows:

> "Notwithstanding any provision of this Act to the contrary, the Department of Transportation shall have no power to promulgate rules or regulations, or to issue or deny permits, with respect to barge fleeting areas in rivers located wholly or partly within this State. For purposes of this paragraph, 'barge fleeting area' means a facility, at a fixed site, which is used to provide barge mooring services."

By letter dated 5 October 1981, Mr. Dave Boyce, Illinois Department of Transportation, informed Riverway that his agency no longer had authority to issue or deny permits for fleeting facilities and had discontinued processing such applications.

b. *Section 401 Certification*:

The installation, operation and maintenance of fleeting facilities addressed in this memorandum will not involve a discharge of dredged or fill material into waters of the United States. Accordingly, Section 401 certification by the Illinois Environmental Protection Agency will not be required.

5. *Finding of No Significant Impact (FONSI)*:

My finding that issuance of the pending Department of the Army permit would produce no significant impact on the human environment is recorded in an environmental assessment which I signed and placed in the public record on 30 October 1981.

6. *Determination and Findings*

The possible consequences of issuing the pending Department of the Army permit have been studied on the basis of economics, engineering feasibility, and anticipated effects on the total environment. I have considered and analyzed a wide range of possible impacts that could result from the construction and operation of the proposed fleeting facility. In attempting to fully identify all possible ef-

fects, the St. Louis District employed a variety of techniques to obtain comments and data pertinent to applicant's proposals. In addition to a large volume of data submitted by the applicant, considerable relevant information was received in response to two public notices. Additional valuable comment was obtained from interested parties during a public hearing held at Pere Marquette State Park on 18 December 1980. Input to the study was also provided by Federal, state and local agencies and environmental groups. I find that issuance of a Department of the Army permit, as prescribed by regulations published at 33 CFR 320 through 325 to establish a barge fleeting facility along the Illinois shore of the Mississippi River at Grafton in Jersey County, is based on thorough analysis and evaluation of the various factors addressed in this memorandum; that the proposed work is indorsed by the municipality and county in which the work will be implemented; that the proposed work is deemed to comply with established state and local laws and regulations, that there have been no identified significant adverse environmental effects related to the work; that the issuance of this permit is consonant with national policy, statutes, and administrative directives; and that, on balance, the total public interest should best be served by the issuance of a Department of the Army permit for the proposed work.

15 June 82
DATE

/s/ Robert J. Dacey
Colonel, CE
Commanding

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, D.C. 20310

Honorable G. Ray Arnett
Assistant Secretary for Fish
and Wildlife and Parks
Department of Interior
Washington, D.C. 20240

Dear Mr. Arnett:

This responds to your letter of August 25, 1982 requesting review under our Memoranda of Agreement (MOA) of the decision of the St. Louis district engineer to issue a permit to National Marine Service, Inc. to construct a barge fleeting facility in the Mississippi River near Grafton, Illinois.

With the three criteria for elevation firmly in mind, I have reviewed your letter and the correspondence to the Corps from your regional director as well as the environmental assessment and the Finding of Fact by the district engineer. Let me point out that the Corps proposes to withdraw this permit and require appropriate restoration when the new Lock and Dam 26 is completed in 1987 since there will no longer be any need for the fleeting area. You have raised five issues in your letter and I shall address them in turn although I find it difficult to see that any are issues of national concern requiring policy level review.

The first issue concerns a possible impact of the fleeting area on the downstream mussel bed which you state is the largest in the three hundred mile reach of the Upper Mississippi River. When this concern was expressed in the processing of the application, a study was performed which concluded that re-suspended bed material would not be deposited on the mussel bed and that there should be no impacts to the mussel beds from the proposed fleeting activity. The Corps will require the applicant to repeat the mussel study after two years to determine if impacts are occurring. This will allow the opportunity for corrective action in the event it is appropriate.

The second point concerns the possible impact on catfish over-wintering in the fleeting area. Your letter states that "abundance and distribution of wintering catfish areas are poorly documented". Since neither the environmental assessment, the Finding of Fact, nor the record of the public hearing indicates any concern over the catfish and the subject was apparently not raised until the elevation process, I must presume that the impacts are somewhat speculative and are not an issue of major concern. Also, the fleeting area only covers a small portion of Lake Alton and would only be a temporary fixture.

The third point concerns the possible impact on recreational users. The loss of fishing surface area is of a de minimus nature and the adjacent shoreline contains no launching ramps or beaches. I support the district engineer's finding that there is no significant impact on recreational uses.

As a fourth point, you indicated that there was not a sufficient consideration of alternative sites. The district engineer agrees that alternate sites could be found for the proposed project but he believes that the proposed "site offers advantages over any alternate sites in terms of operational efficiencies and reduced fuel consumption". The hearing record indicates that there had been a previous unsuccessful attempt to obtain river frontage for fleeting operations. I find that the subject of alternative sites has been adequately addressed and in light of the inconclusive nature of the impacts which might possibly be caused by use of the proposed site there is no need for further search for alternative sites.

Finally, your letter points out that there is no area-wide plan for large fleeting operations. While the Corps has no authority to develop or implement multi-use plans for private land abutting Pool 26, the district engineer states his willingness to assist any local governments in the preparation of such a plan.

I must conclude from the information which I have reviewed that this case contains no issues of national concern which need policy level review nor are there indications of inadequate coordination or new information. Therefore, I have decided not to have the district engineer's decision reviewed at a higher level. I encourage you to request review of only those cases which clearly meet the criteria of the MOA.

Sincerely,

/s/ William R. Gianelli
Assistant Secretary of the Army
(Civil Works)

cf: SACW (read,file,sign)
SASG
LTC/Peizotto/daw/15 Sep 82

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 4332
(National Environmental Policy Act)

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

* * *

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

33 C.F.R. Part 230, Appendix B
(Regulations of the Corps of Engineers)

8. *EA/FONSI Document.* (See 40 CFR 1508.9 and 1508.13 for definitions).

a. *Environmental Assessment (EA).* The district engineer shall prepare an EA as soon as practicable after all relevant information has been made available to the district engineer (i.e., after the comment period for the public notice announcing receipt of the permit application has expired) and prior to preparation of the Findings of Fact (FOF). The EA shall include a discussion of reasonable alternatives. However, when the EA confirms that the

impact of the applicant's proposal is not significant, there are no "unresolved conflicts concerning alternative uses of available resource . . ." (Section 102(2)(E) of NEPA), and the proposed action is a water dependent activity, the EA need not include a discussion on alternatives to the proposal. In all other cases the EA must address all the alternatives, that go before the ultimate decision maker. This discussion will include suggested means by which the environment might be protected and by which adverse impacts could be reduced by conditioning of the permit. The EA shall be a brief document (should not normally exceed 15 pages) primarily focusing on whether or not the entire project subject to the permit requirement could have significant effects on the environment but shall not be used to justify a decision. (For example, where a utility company is applying for a permit to construct an outfall pipe from a proposed power plant, the EA must assess the direct and indirect environmental effects and alternatives of the entire plant.) The EA shall conclude with a FONSI (See 40 CFR 1508.13) or a determination that an EIS is required.

b. *Responsibilities in Preparing EA.* If information for an EA is undertaken by an outside consultant or prepared by the applicant, the district engineer is responsible for independent verification and use of the data, evaluation of the environmental issues, and for the scope and content of the EA. Preparation of an EA shall be based on considerations discussed in 40 CFR Parts 1501, 1506 and 1508 and the instruction contained in paragraph 9 of the basic regulation.

40 C.F.R. § 1506.5
(Regulations of Council on Environmental Quality)

1506.5 Agency responsibility.

(a) *Information.* If an agency requires an applicant to submit environmental information for possible use by the

agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

(b) *Environmental assessments.* If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

Nos. 85-785 and 85-800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-785

RIVERROAD ALLIANCE, INC., *et al.*,
Petitioners,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, *et al.*,
Respondents.

No. 85-800

PEOPLE OF THE STATE OF ILLINOIS,
Petitioners,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, *et al.*,
Respondents.

BRIEF OF RESPONDENT NATIONAL MARINE SERVICE INCORPORATED IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ANDREW ROTHSCHILD
LEWIS & RICE
611 Olive Street, Suite 1400
St. Louis, Missouri 63101
(314) 444-7600

Attorneys for Respondent National Marine Service Incorporated

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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40 C.F.R. §1508.27(b) +

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* These statutory provisions and regulations are set forth in the Appendix filed in Case No. 85-800 at App. 71, 72 and 73-74 respectively.

+ These statutory provisions and regulations are affixed to this brief in a Supplemental Appendix, which will be referred to as "Supp.App." The provisions and regulations may be found at Supp.App. A-12 - A-18.

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Petitioners,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, *et al.*,
Respondents.

No. 85-800

PEOPLE OF THE STATE OF ILLINOIS,
Petitioners,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, *et al.*,
Respondents.

BRIEF OF RESPONDENT NATIONAL MARINE SERVICE INCORPORATED IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTRODUCTION

Respondent National Marine Service Incorporated ("National Marine") will respond in this brief to two petitions for certiorari arising from the decision of the United States Court of Appeals for the Seventh Circuit in *River Road Alliance, Inc. et al. v. Corps of Engineers of United States Army, et al.* reported

at 764 F.2d 445 (7th Cir. 1985). (App. 1-25).[1] These are *River Road Alliance, Inc. et al. v. Corps of Engineers, etc.*, No. 85-785 and *People of the State of Illinois v. Corps of Engineers, et al.*, No. 85-800. This joint brief is prepared in the interest of judicial economy and brevity.

STATEMENT OF THE CASE

Petitioners River Road Alliance, Inc. et al. ("River Road") and People of the State of Illinois ("Illinois") have failed to provide statements of the case that are complete, accurate, supported by the record or made without comment or argument. National Marine, due to the limited nature of this brief, will not provide a full statement of the case, but will, instead, correct and supplement the content of petitioners' statements of the case.

Facts Regarding the Alton Pool of the Mississippi River.

River Road (R.R. 3-12)[2] makes factual assertions regarding the Alton pool (or Alton Lake) of the Mississippi River which are not supported by the record. Acknowledging this deficiency, River Road (R.R. 4, fn.2) claims that these facts are contained in a "sworn complaint, not contravened by any counter-affidavit." This is inaccurate. River Road's First Amended Complaint (D.E. I 11)[3] is not verified. Further, National Marine (D.E. I 16) and the Corps of Engineers (D.E. I 25) denied most of River Road's allegations and moved to strike the remaining allegations (D.E. I 12, 23).

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[1] National Marine will refer to the Appendix filed in Case No. 85-800 as "App. ____."

[2] National Marine will refer to River Road's Petition for Writ of Certiorari as "R.R. ____."

[3] National Marine will refer to the District Court docket file for the River Road case (No. 82-5285) as "D.E. I ____," and the Illinois file (No. 83-5071) as "D.E. II ____."

Further, petitioners would have this Court believe that the segment of the Mississippi River in question was a pristine wildlife and recreational area free of river commerce. (R.R. 2-5; Ill. 4-5).[4] The record does not support this claim. The Seventh Circuit held:

> The State of Illinois, as appellee, acknowledges that Alton Lake "undergoes heavy barge traffic"; as many as 300 barges pass through it in a day. But the shores of the scenic portion are free from commercial development, except that National Marine Service has a shipyard, with until recently a fleeting facility attached, a half mile north of the proposed site. National Marine Service had leased that fleeting facility from the Illinois Department of Transportation, which cancelled the lease during the lawsuit. (App. 2; *see also* App. 10).

Petitioners' contentions about the potential threat to the Great River Road from the permitted activity (River Road 5-7; Ill. 4-5) are seriously undermined because Illinois itself leased property adjacent to the site in question to National Marine for the very same purpose — barge fleeting. (App. 2).

The Proposed Permitted Activity.

The application to the Corps of Engineers was for a permit[5] authorizing National Marine to install three anchors, mooring buoys and anchor chain and to fleet a maximum of 30 barges (six wide and five long) on the Illinois bank of the Mississippi River. (Vol. I, p. 1-2).[6] The proposed site is located just

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[4] National Marine will refer to Illinois' Petition for Writ of Certiorari as "Ill. ____."

[5] The Corps of Engineers' permission is required for the proposed fleeting activity pursuant to the River and Harbors Act of 1899, §10, 33 U.S.C. §403 (1982).

[6] National Marine will refer to the administrative record filed by the Corps of Engineers by volume and page as "Vol. ____, p. ____."

downriver from National Marine's shipyard and barge repair facility at Grafton, Illinois. (Riverway Statement, p. 1).[1]

The proposed activity would, at a maximum, encompass approximately 1,500 feet of: (1) the 256 miles of shoreline in the Alton pool and (2) the seven-mile scenic stretch for which petitioners express concern. (App. 2). The proposed fleeting area would not involve any permanent improvements and would be temporary. Upon termination of the permit, in approximately 1988, the facilities will be removed without leaving any damage to the scenic properties of the area. (App. 2, 10; Riverway Statement, p. 1; Vol. II, p. 21).

National Marine's purpose in applying for the permit was two-fold. First, it intended to use the area to fleet barges before and after repair at its adjacent shipyard. Second, the fleet site would alleviate some of the congested river traffic resulting from the existing Lock and Dam No. 26 and construction of the new Lock and Dam No. 26 at Alton, Illinois. (Riverway Statement, p. 2-4, 17).

The Corps of Engineers Environmental Evaluation of the Proposed Permitted Activity.

The Corps of Engineers solicited comments on the application from interested parties including federal, state and local governmental agencies, environmental groups, river-related interests and others affected by the proposal. A public hearing was conducted in the area on December 18, 1980. (Vol. I, Ex. 9, pp. 3-8). At the hearing, 76 individuals spoke, representing various interests. (App. 9, 46; Vol. I, Ex. 21; Vol. II generally). In addition, the Corps of Engineers received and reviewed hundreds of written submissions. (App. 9, 46-47; Vol. I, Ex. 20, 22, 24).

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[1] The "Riverway Statement" refers to a portion of the administrative record, as supplemented by the District Court on June 15, 1984.

The Mayor and City Council of Grafton, Illinois (Vol. III, pp. 82-83) and the Jersey County Board (Vol. III, p. 72), where the proposed activity was located, supported issuance of the permit. The Illinois Department of Conservation Historic Preservation Office concluded that the project would have no effect on historic, architectural or archeological sites in the area, including the villages of Chatauqua and Elsah. (Vol. I, Ex. 7, p. 10). The Illinois Environmental Protection Agency concluded the proposed activity would not cause water pollution (Vol. I, Ex. 8, pp. 11-12) and the Coast Guard found no threat to navigational safety (Vol. II, pp. 23-24). Illinois Senator Charles Percy and Congressman Paul Findley recommended approval of the permit. (Vol. I, Ex. 68, pp. 329-31).

The Illinois Department of Conservation ("IDOC") and the U.S. Department of Interior, Fish and Wildlife Service ("USFWS") informed the Corps of Engineers of the possible existence of a mussel bed in the vicinity of the proposed site. (Vol. I, Exs. 15, 16, 17, 18, 29 and 30). In response to this, National Marine hired a consultant to conduct a mussel survey to identify the location of any such mussel bed. (Vol. III, p. 69). The study was completed and circulated to IDOC and USFWS in September 1981. (Vol. I, Ex. 32, pp. 164-204; Ex. 33, p. 205; Ex. 34, p. 206). The study concluded that: (1) no federally listed endangered species were identified in the area (Vol. I, Ex. 32, pp. 186, 189), (2) the mussel bed did not extend upriver from Mile 217.1 (2/10 of a mile downriver from the proposed fleet site) (Vol. I, Ex. 32, p. 181) and (3) fleeting activity at the proposed site would not increase the already existing impact on the mussel bed caused by commercial harvesting, pollution and passing tows. (Vol. I, Ex. 32, pp. 186-87).

The Corps of Engineers issued its Environmental Assessment ("EA") on October 30, 1981, accompanied by a Finding of No Significant Impact ("FONSI") in which it concluded that the permit "subject to proposed limitations and special conditions," would not so significantly affect any facet of the

human environment as to require preparation of an Environmental Impact Statement ("EIS"). (App. 38-42).

On May 12, 1982, the Corps of Engineers met further with IDOC and USFWS to discuss the mussels. As a result of the meeting, IDOC submitted a monitoring proposal, which was estimated to cost $200,000. (Vol. I, Ex. 56, pp. 241-46). Each agency searched for funds for the proposal; none were available. The Corps of Engineers concluded that it was unreasonable to require National Marine to fund an "ambitious" study of such magnitude, but stated it would require National Marine to conduct a follow-up mussel survey. In light of the failure to fund the monitoring program, IDOC and USFWS chose to oppose the entire project instead of exploring further any resolution of the issue. (Vol. I, Ex. 57, p. 247).

As part of its submission to the Corps of Engineers, National Marine (actually Riverway, its predecessor in interest) provided information regarding its exploration of alternatives. (Riverway Statement, pp. 6-8). The Illinois River and the Missouri bank of the Mississippi River were found to be unsuitable for fleeting. A consultant's study was submitted (Riverway Statement, Ex. B) and concluded that no alternative site was available that: (1) met the physical requirements for fleeting, (2) was reasonably close to the Grafton shipyard, and (3) provided the possibility of acquiring sufficient riparian interests for fleeting use. Neither petitioners nor any other interested party provided any information to the Corps of Engineers about any other site that met the necessary criteria. (App. 13). The Corps of Engineers concluded that, while other sites could be found, the proposed site offered advantages over any alternative site. (App. 58).

The Corps of Engineers issued its Findings of Fact (App. 43-67) on June 15, 1982. This document summarized its investigation, assessment and conclusions regarding the permit application. On September 15, 1982, Assistant Secretary of the Army William R. Gianelli denied elevated review of the matter. (App. 68-70).

The Issuance of the Permit to National Marine.

On October 5, 1982,[8] the Corps of Engineers issued the permit containing several special conditions.[9] Special Condition 2n required National Marine to discontinue use of the permitted site after notification of completion of the new Lock and Dam No. 26. Special Conditions 2a and 2b related to monitoring and protection of the downriver mussel bed. Special Condition 2j prohibited mooring of barges with cargoes of gasoline, petroleum products, chemicals or similar products. Special Condition 2l prohibited permanent mooring of work barges, anchor barges, fleet barges, derelicts or sunken vessels at the site. Special Condition 2m required minimization of light and noise pollution by search lights, bullhorns and machinery at the site.

The facility went into operation in October 1982 at 30 to 40 percent capacity (9-12 barges) until the district court enjoined it on April 30, 1984. (App. 4).

SUMMARY OF ARGUMENT

I. The result in this case will be the same regardless of which standard of review is applied. The proposed activity, as the Corps of Engineers found in accordance with controlling statutes and regulations, is not of sufficient magnitude to require further environmental scrutiny.

II. The Corps of Engineers complied with the National Environmental Policy Act of 1969, ("NEPA"), §102, 42 U.S.C. §4332 (1976) by independently evaluating a site analysis by National Marine that justified the proposed

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[8] On September 22, 1982, the District Court entered a temporary restraining order against issuance of the permit. The TRO expired on its own terms on September 27, 1982.

[9] For unknown reasons, petitioners failed to include the permit in their Appendix. The permit with its special conditions may be found at Supp.App. A-6 - A-9.

site. The Corps of Engineers received no contradictory information regarding alternative sites, and discharged its legal duties under the permit procedure.

III. The Seventh Circuit did not establish a cost/benefit analysis as a new prerequisite to the decision whether to prepare an EIS. The Circuit Court accepted the Corps of Engineers' finding that an EIS was not required because the proposed action would not have a sufficiently "significant" impact on the environment. The Seventh Circuit merely acknowledged the present state of the law and the trend towards limiting the use of an EIS to activities with truly significant impacts on the environment.

IV. The Seventh Circuit did not substitute its judgment for that of the Corps of Engineers. Instead, it affirmed the Corps of Engineers' decision. Furthermore, the Seventh Circuit owed no deference to the District Court in reviewing the agency record.

ARGUMENT

There is nothing about this case that warrants review by this Court.

I.

This Case Would Be Affirmed Regardless Of Which Standard Of Review Is Applied.

Petitioners assert that this Court should grant certiorari to review the split in the circuits regarding the appropriate standard of judicial review to apply to a federal agency's decision not to prepare an EIS. Petitioners argue, as they must, that application of a different standard than that used by the Seventh Circuit would change the outcome of the judicial review. However, the Seventh Circuit squarely addressed this matter and concluded that, regardless of which standard was applied, the result would be the same. (App. 6-7).[10]

This Court will readily see that the permitted activity in this case is not of such magnitude as to require an EIS. Therefore, as the Seventh Circuit concluded, whether judicial review of the Corps of Engineers' determination is "plenary" or "deferential" is inconsequential. The permitted activity is of extremely limited scope measured by space, time and permanent impact. It involves utilization of a miniscule portion of the Mississippi River and the Alton pool. It is temporary and will expire in approximately 1988. Upon expiration, all facilities will be removed from the area.

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[10] In light of this conclusion, this case is distinguishable from the situation in *Gee v. Boyd*, ____ U.S. ____, 105 S.Ct. 2123 (1985), in which three justices of this Court dissented to the denial of a writ of certiorari. In *Gee*, the appellate court gave no indication whether it would have decided the case differently under a "reasonableness" standard of review.

The two most significant impacts claimed by petitioners are aesthetic considerations and aquatic life. The Corps of Engineers properly concluded that the impact on any aesthetic concerns was sufficiently subjective and the impact on aquatic life was sufficiently speculative to eliminate the need for further scrutiny. Moreover, the temporary nature of the permitted activity means that any such concerns will be removed in a relatively short period.

Petitioners further urge this Court to adopt a standard by which an environmental plaintiff can, by merely alleging that a project *may* significantly degrade *some* environmental factor, force the Corps of Engineers to make one of two choices: (1) either conclude that the project will have "absolutely no effect" that would significantly degrade *any* environmental factor or, (2) failing to meet that stringent standard, prepare an EIS. (Ill. p. 13-14). Adoption of this argument would most assuredly require preparation of an EIS for virtually every proposed action. Environmental plaintiffs will have no problem making such *allegations* and federal agencies will rarely, if ever, be able to meet petitioners' proposed conclusion.

Petitioners' proposal is contrary to the trend of reducing the number of projects that require an EIS to those with truly significant impacts on the environment. (App. 9-10). The Seventh Circuit's decision is consistent with this judicial trend and need not be reviewed further by this Court.

II.

The Corps Of Engineers Complied With NEPA Section 102(2)(E) Regarding Alternatives.

Petitioners dramatically claim that the Seventh Circuit decision regarding the agency's duties under Section 102(2)(E) of NEPA "produce a question of first impression and national importance" (Ill. p. 18) and that the decision has "judicially

repealed" this section of NEPA. (Ill. p. 22). This Court should conclude that these claims are exaggerated and without basis.

NEPA requires that agencies "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." §102(2)(E), 42 U.S.C. §4332(2)(E) (App. 72). Petitioners focus on the agency's duty to study, develop and describe alternatives, but ignore the remainder of the statute and fail to identify any unresolved conflict concerning alternative uses of the available resources. As petitioners state, Congress' intention in enacting §102(2) (E) was to ensure that no federal projects were undertaken without consideration of more ecologically sound courses of action and that the agency decision-maker had before him all possible approaches to a particular project. (Ill. p. 19).

The Corps of Engineers' findings of fact make it apparent that alternatives were considered. The Corps had before it a study by National Marine regarding its exploration of alternatives. (App. 57). The district engineer found that there were alternative fleeting sites, but he also found that the "Grafton site offers advantages over any alternative sites in terms of operation efficiencies and reduced fuel consumption . . . ." (App. 58). The Corps' use of National Marine's study on alternative sites is not a violation of NEPA. *Save Our Wetlands, Inc. v. Sands,* 711 F.2d 634, 643 (5th Cir. 1983). In fact, Council on Environmental Quality ("CEQ") regulations specifically allow an agency to permit an applicant to prepare an *entire* Environmental Assessment so long as the agency makes its own evaluation of the environmental issues and takes responsibility for the scope and content of the assessment. 40 C.F.R. §1506.5(b) (App. 73-74). That is precisely what the Corps of Engineers did in this case. No interested party, including petitioners, suggested any other comparable site. The Corps of Engineers' determination was not rebutted. There were no "unresolved conflicts concerning alternative uses of available resources."

Moreover, the scope of alternatives to be considered is narrower where the agency has determined, as here, that the proposed action will not significantly affect the environment. *City of New York v. United States Department of Transportation,* 715 F.2d 732, 741-45 (2d Cir. 1983), *cert. denied* 104 S.Ct. 1403 (1984). Further, the Corps of Engineers' consideration of alternatives will be upheld even where other possible alternatives may exist. *Save Our Wetlands, Inc. v. Sands,* 711 F.2d 634, 645 (5th Cir. 1983). And this Court, in *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.,* 435 U.S. 519, 553-55 (1978), said that a challenging party must alert the agency in an administrative hearing to its contentions in specific and focused language and not in "cryptic and obscure reference to matters that 'ought to be considered' " when dealing with omitted alternatives. In that light, the Seventh Circuit was clearly correct in stating that:

> The Corps was entitled not to conduct a further study of alternatives unless the plaintiffs were prepared to shoulder the burden of showing that National Marine had overlooked some plausible alternative site — and they were not. The Corps is not a business consulting firm. It is in no position to conduct a feasibility study of alternative sites on the Mississippi for a barge fleeting facility, a study that would have to both evaluate National Marine Services' business needs and determine the availability of the necessary permissions from the owners of riparian land at the various sites. The Corps has to depend on the parties for such information, and National Marine Service's submission was unrebutted.

(App. 13).

III.

The Seventh Circuit Did Not Establish A New Prerequisite To The Preparation Of An Environmental Impact Statement.

Petitioner River Road claims that the Seventh Circuit devitalized NEPA by judicially imposing a new requirement to excuse an agency's obligation to otherwise prepare an EIS (River Road p. 37-45). Specifically, it erroneously claims that the Seventh Circuit held that a reviewing court should look to whether the time and expense of an EIS are commensurate with the likely benefits of a more reaching evaluation.

This argument makes no sense because it suggests that the Seventh Circuit initially held that an EIS should be prepared and then excused its preparation on a cost/benefit basis. In fact, the Seventh Circuit affirmed the Corps of Engineers' determination that the proposed activity did not require an EIS. Instead of creating a new prerequisite to an EIS, as petitioner River Road maintains, the Seventh Circuit Court merely paraphrased a balancing process already used by the Corps of Engineers and authorized in regulations promulgated by it and the CEQ.

The CEQ has expressed its awareness of the tension between costs and benefits. In 40 C.F.R. §1500.4(q) (Supp.App. A-15), it requires agencies to reduce excessive paper work by "using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an Environmental Impact Statement."

Congress and the CEQ left it to the individual agencies to determine whether an EIS was necessary for a proposed action. Section 102(2)(B) of NEPA, 42 U.S.C. §4332(2)(B), (App. 71), states that a federal agency shall "identify and develop methods and procedures, in consultation with the Council on En-

vironmental Quality" to ensure "presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations." CEQ regulation 40 C.F.R. §1501.4(a) (Supp.App. A-15 - A-16) provides that the agency shall determine "under its procedures" whether or not a proposal fits into a category requiring an EIS. If a proposal does, then the determination whether to prepare an EIS is to be based "on the Environmental Assessment." 40 C.F.R. §1501.4(c) (Supp.App. A- 16). In accordance with these mandates, the Corps of Engineers' developed lists of activities that normally require an EIS (33 C.F.R. §230.6; Supp.App. A-12 - A-14) and those that require an EA, but not necessarily an EIS (33 C.F.R. §230.7; Supp.App. A-14). Included in the latter are regulatory permits, for which the Corps has issued general policies:

> (1) The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a *careful weighing* of all those factors which become relevant in each particular case. The *benefits* which reasonably may be expected to accrue from the proposal *must be balanced* against its reasonable foreseeable *detriments*. The *decision* whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are *therefore determined by the outcome of the general balancing process*. * * * (Emphasis added).

33 C.F.R. §320.4(a)(1) (Supp. App. A-14 - A-15).

Similarly, the decision whether to engage in an EIS is one of judgment that requires the careful weighing of various factors enumerated by the CEQ in its definition of "significantly" at 40 C.F.R. §1508.27(b) (Supp.App. A-16 - A-18). The CEQ also recognized that a balancing of factors was necessary. It pointed out that the "significance of an action must be analyzed in

several contexts" and that it would vary "with the setting." 40 C.F.R. §1508.27(a) (Supp.App. A-16). It implicitly demanded a balancing process by listing 10 factors to be considered in evaluating the intensity of an impact.

The Corps of Engineers, in reaching the conclusion that an EIS was not required, adhered to the above-described regulatory requirements. The Seventh Circuit affirmed that the Corps of Engineers acted within its authority in reaching the conclusion. Nowhere in this process did the Seventh Circuit judicially impose any new requirement.

IV.

The Seventh Circuit Affirmed The Findings Of The Corps Of Engineers And Did Not Substitute Its Own Judgment For That Of The Agency.

Petitioner River Road argues that the Seventh Circuit substituted its judgment for that of the Corps of Engineers regarding whether to prepare an EIS. (River Road pp. 22-37). This claim is puzzling in that the Seventh Circuit *affirmed* the Corps of Engineers' determination that an EIS was not necessary.

The limited scope of judicial review of agency actions involving assessment of environmental concerns under NEPA is well settled. See *Strycker's Bay Neighborhood Council, Inc. v. Karlan,* 444 U.S. 223, 227-28 (1980) and cases cited therein; and *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87 (1983). The Seventh Circuit expressly acknowledged this standard and adhered to it:

> "The nature of the required judgment explains why we have held that an agency's decision not to prepare an environmental impact statement will be set aside only if it is an abuse of discretion."

(App. 6);

> "It is not whether we, if we were the Army Corps of Engineers, would have denied the permit. It is whether the Corps exceeded the bounds of its decision-making authority in concluding that the fleeting facility would not have so significant an impact on the environment as to require a more elaborate study of environmental consequences.

(App. 7);

> "Whether an evironmental impact statement was required in this case was a 'sufficiently close question to prevent us from substituting our judgment for the Corps.' "

(App. 10).

River Road mistakenly relies on the District Court opinion and erroneously asserts that the Seventh Circuit should have given some deference to its findings. (River Road pp. 26-29). River Road's misplaced argument is that the District Court opinion is amply supported by the record, and River Road criticizes the Seventh Circuit for declining to review the District Court findings.

The summary judgment entered by the District Court was based on the administrative record of the agency. Accordingly, the Seventh Circuit was authorized to make an independent review of the agency determination without according any deference to the District Court. *Camp v. Pitts,* 411 U.S. 138, 142 (1973); *Louisiana Environmental Society, Inc. v. Dole,* 707 F.2d 116, 119 (5th Cir. 1983); and *Brown v. United States Department of Interior,* 679 F.2d 747, 748-49 (8th Cir. 1982). This is particularly true where, as here, petitioners' counsel prepared the decision for the District Court's signature. (App. 4). *CECO Corp. v. Bliss & Laughlin Industries, Inc.,* 557 F.2d 687, 689 (9th Cir. 1977).

River Road cites several specific examples purportedly supporting its claim. It is not necessary to review them in detail because River Road's basic contention is misplaced. However,

it is noted that these specific examples pertain to arguments petitioners made elsewhere or concern matters of lesser significance that do not affect the outcome of this matter.

CONCLUSION

This Court should deny the petitions of River Road and Illinois for writs of certiorari.

Respectfully submitted,

Andrew Rothschild
LEWIS & RICE
611 Olive Street, Suite 1400
St. Louis, Missouri 63101
(314) 444-7600

Attorneys for Respondent
National Marine Service Incorporated

SUPPLEMENTAL APPENDIX

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THE PERMIT

Application No. P-07V OX 1 001425

Name of Applicant National Marine Service, Inc.

Effective Date 5 October 1982

Expiration Date (If applicable) 31 December 1985

DEPARTMENT OF THE ARMY
PERMIT

Referring to written request dated 21 August 1980 for a permit to:

(X) Perform work in or affecting navigable waters of the United States, upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403):

National Marine Service, Inc.
1750 Brentwood Boulevard
Brentwood, Missouri 63144

is hereby authorized by the Secretary of the Army:

to construct, operate and maintain a barge fleeting facility along the left bank of the Mississippi River, approximately mile 217.3, Upper Mississippi River near Grafton, Illinois

in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (on drawings give file number or other definite identification marks.)

entitled "Proposed Fleeting Area by Riverway Towing Company in Mississippi River at mile 217.3 near Grafton, County of Jersey, State of Illinois," dated 21 August 1980 in one sheet

Subject to the following conditions:

1. General Conditions:

a. That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit, and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions j or k hereto, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

b. That all activities authorized here, shall, if they involve, during their construction or operation, any discharge of pollutants into waters of the United States or ocean waters, be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibition, pretreatment standards and management practices established pursuant to the Federal Water Pollution Control Act of 1972 (P.L. 92.500 86 Stat. 816) the Marine Protection, Research and Sanctuaries Act of 1972 (P.L. 92.532, 86 Stat. 1052) or pursuant to applicable State and local law.

c. That when the activity authorized herein involves a discharge during its construction or operation of any pollutant including dredged or fill material, into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in such revised or modified standards, or with such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Enviornmental Protection Agency, may determine to be reasonable under the circumstances.

d. That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

e. That the permitee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

f. That the permitee agrees that he will prosecute the construction or work authorized herein in a manner so as to minimize any degradation of water quality.

g. That the permittee shall permit the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

h. That the permitee shall maintain the structure or work authorized herein in good condition and in accordance with the plans and drawings attached hereto.

i. That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges, and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations nor does it obviate the requirement to obtain State or local assent required by law for the activity authorized herein

j. That this permit may be summarily suspended, in whole or in part, upon a finding by the District Engineer that immediate suspension of the activity authorized herein would be in the general public interest. Such suspension shall be effective upon receipt by the permittee of a written notice thereof which shall indicate (1) the extent of the suspension, (2) the reasons for this action, and (3) any corrective or preventative measures to be taken by the permittee which are deemed necessary by the District Engineer to abate imminent hazards to the general

public interest. The permittee shall take immediate action to comply with the provisions of this notice. Within ten days following receipt of this notice of suspension, the permittee may request a hearing in order to present information relevant to a decision as to whether his permit should be reinstated, modified or revoked. If a hearing is requested, it shall be conducted pursuant to procedures prescribed by the Chief of Engineers. After completion of the hearing, or within a reasonable time after issuance of the suspension notice to the permittee if no hearing is requested, the permit will either be reinstated, modified or revoked.

k. That this permit may be either modified, suspended or revoked in whole or in part if the Secretary of the Army or his authorized representative determines that there has been a violation of any of the terms or conditions of this permit or that such action would otherwise be in the public interest. Any such modification, suspension, or revocation shall become effective 30 days after receipt by the permittee of written notice of such action which shall specify the facts or conduct warranting same unless (1) within the 30-day period the permittee is able to satisfactorily demonstrate that (a) the alleged violation of the terms and the conditions of this permit did not, in fact, occur or (b) the alleged violation was accidental, and the permittee has been operating in compliance with the terms and conditions of the permit and is able to provide satisfactory assurances that future operation shall be in full compliance with the terms and conditions of this permit, or (2) within the aforesaid 30-day period, the permittee requests that a public hearing be held to present oral and written evidence concerning the proposed modification, suspension or revocation. The conduct of this hearing and the procedures for making a final decision either to modify, suspend or revoke this permit in whole or in part shall be pursuant to procedures prescribed by the Chief of Engineers.

l. That in issuing this permit, the Government has relied on the information and data which the permittee has provided in

connection with this permit application. If, subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Government may, in addition, institute appropriate legal proceedings.

m. That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

n. That the permittee shall notify the District Engineer at what time the activity authorized herein will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of any suspension of work, if for a period of more than one week, resumption of work and its completion.

o. That if the activity authorized herein is not completed on or before the 31st day of December, 1985 (three years from the date of issuance of this permit unless otherwise specified) this permit is not previously revoked or specifically extended, shall automatically expire.

p. That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

q. That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition t hereof, he must restore the area to a condition satisfactory to the District Engineer.

r. That if the recording of this permit is possible under applicable State or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the respon-

sibility for maintaining records of title to and interests in real property.

s. That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

t. That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized by conveyance of realty, the deed shall reference this permit and the terms and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

II. **Special Conditions:** (Here list conditions relating specifically to the proposed structure or work authorized by this permit)

2a. That at the end of the second year of operation, and continuing for such additional years as may be prescribed by the District Engineer, permittee shall provide information concerning fleeting operations and mussel bed productivity as follows:

- Within 30 days following the anniversary date of this permit, submit a report to the District Engineer indicating number of barges fleeted during the year, by date, and report number of days fleet was serviced by push boats.

- On or before the second anniversary date of this permit, submit a report to the District Engineer indicating the size, location, population density and distribution, and species composition of an adjacent mussel bed, based on a survey performed during any of the summer months immediately preceding the anniversary date. Insofar as possible, your survey should

duplicate those survey and classification procedures that were reported in a pre-operational mussel survey submitted to the District Engineer on 15 September 1981.

2b. That permittee hereby acknowledges notification that evidence of significant damage to the existing mussel bed could result in suspension, modification or revocation of this permit.

2c. That permittee shall insure moored fleet is continuously maintained at or below the maximum size specified on the attached plans. Consistent with prevailing stage and channel conditions, fleet shall be reduced, including complete removal of all barges, if required, to provide free and easy passage for river traffic.

2d. That permittee, to the extent possible, shall prevent or remove accumulation of ice and drift.

2e. That permittee shall reduce fleet size, or take other actions that may be necessary to prevent failure of the anchoring system under any load conditions that may be imposed by flood, ice flows, storms or otherwise.

2f. That in the event permittee's anchoring system fails to hold the moored fleet in position, permittee shall promptly return the anchors and anchor barge to the position authorized by this permit. Permittee shall report such incidents to the District Engineer within 24 hours, and such reports shall include an account of measures taken or proposed by permittee to prevent future incidents.

2g. That permittee is authorized to install additional anchors, chain, or both, to proposed anchor barge, provided such additions do not adversely affect navigation. Plans for the work shall be submitted to the District Engineer for concurrence within 5 days following such installation.

2h. That permittee shall limit the mooring of empty barges, or take other actions that may be necessary to prevent channelward rotation of fleet under any and all conditions.

2i. That permittee shall temporarily remove the anchor barge and fleet, or temporarily reduce fleet, as may be necessary to minimize interference with channel maintenance dredging and disposal operations undertaken by the Corps of Engineers.

2j. That permittee shall not moor barges containing materials classified as hazardous by the US Coast Guard. These materials include but are not limited to gasoline, petroleum products, chemicals and similar products.

2k. That permittee shall not engage in major repair or maintenance operations, loading, unloading or transferring cargo except when required to prevent a barge from sinking.

2l. That permittee shall not permanently moor any work barges, anchor barges or fleet barges, derelicts or sunken vessels at the site.

2m. That permittee shall minimize flashing of search lights on the shore and shall avoid excessive noise from bullhorns and machinery.

2n. That permittee shall discontinue mooring of barges at facilities authorized by this permit following notification by the District Engineer that removal of the existing Lock and Dam No. 26 structures has progressed such that a safe and adequate bypass channel is available for barge traffic. Permittee shall vacate the site within 90 days of such notice and shall restore the area to the satisfaction of the District Engineer.

2o. That upon notification by the District Engineer that biological and/or water quality studies will be performed in the vicinity of permittee's fleeting facilities, permittee shall take measures to insure members of study team are afforded safe access to areas selected for sampling, monitoring, testing and/or similar activities.

The following Special Conditions may be applicable when appropriate

III. Structures In Or Affecting Navigable Waters Of The United States.

3a. That this permit does not authorize the interference with any existing or proposed Federal project and that the permitee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

3b. That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the activity authorized by this permit.

3c. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.

3d. That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

* * * * *

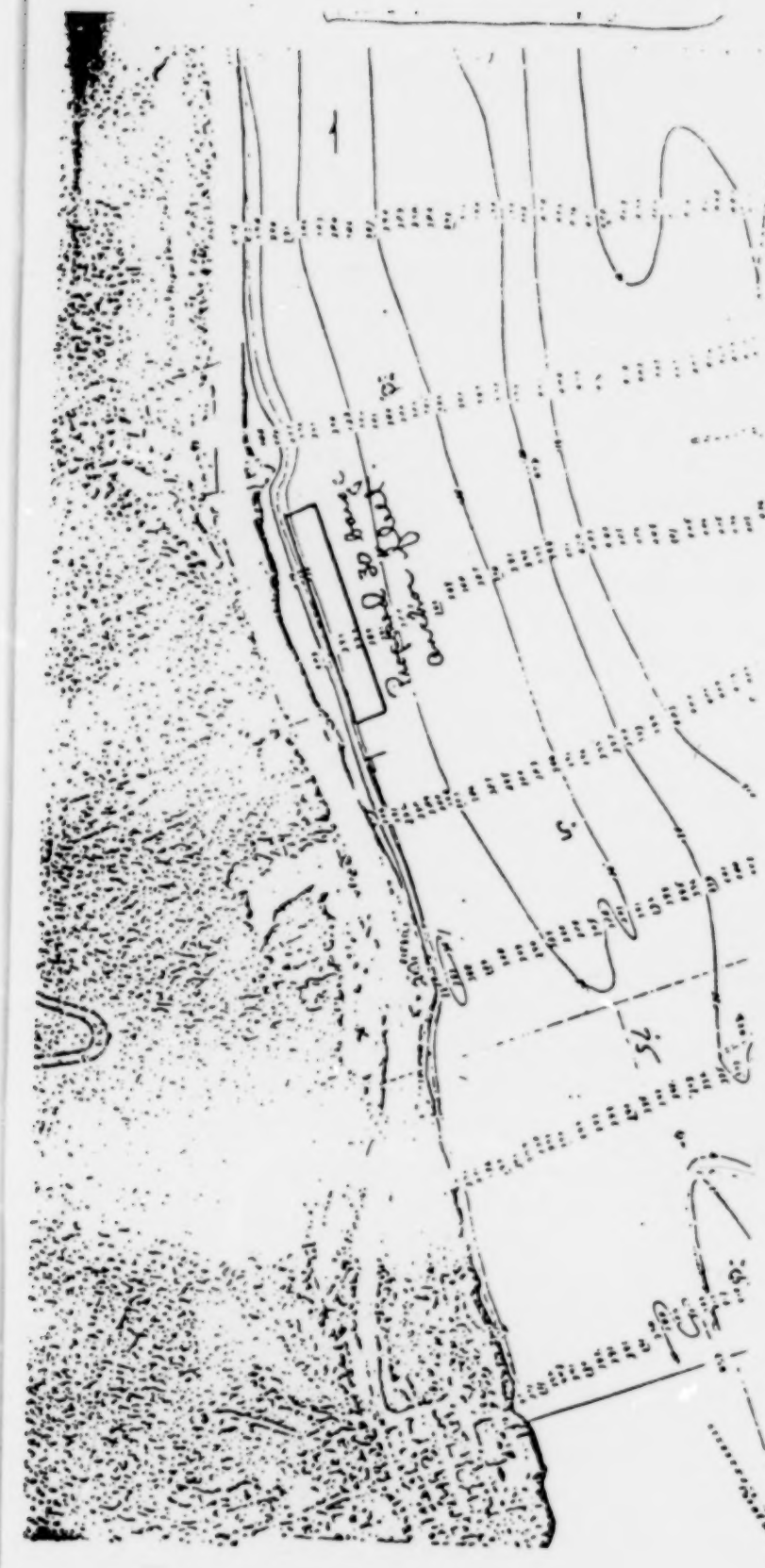
This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

/s/ (President) September 30, 1982
Permittee Date

By Authority Of The Secretary Of The Army:

Gary D. Beech
Colonel, CE
District Engineer
U.S. Army Corps Of Engineers 5 October 1982
Date



STATUTES AND REGULATIONS INVOLVED

33 C.F.R. §230.6
Actions normally requiring an EIS.

Listed below are types of Corps of Engineers actions which normally require the preparation of an EIS, although in certain cases an EA may be adequate (see § 230.7).

(a) *Legislation.* A legislative EIS will be prepared to accompany a bill or legislative proposal to Congress recommended by or with significant cooperation and support of the Corps of Engineers (exclusive of appropriations) significantly affecting the quality of the human environment. A Legislative EIS shall be prepared to conform to the requirements of these regulations except as provided in 40 CFR 1506.8(b).

(b) *Feasibility studies.* Feasibility studies are planning actions conducted in accordance with the ER 1105-2-200 series of regulations. Studies resulting in recommendations by the reporting officer are documented in feasibility reports, which include Preauthorization Survey Reports, Post Authorization Advanced Engineering and Design (AE&D) Planning Reports, Significant Post Authorization Change (S-PAC) Reports and Detailed Project Reports (DPR). Where an EIS or EIS supplement is required it shall be integrated with the Main Report in the feasibility document and noted on the front cover as an Environmental Impact Statement. ER 1105-2-920 and Appendix A of these regulations provide guidance on the organization and content of reports and EIS for feasibility studies, respectively.

(1) *Survey studies.* Survey studies are undertaken in response to specific Congressional Resolutions or by an item in an Act and, if completed through Stage 3 planning, result in a Survey Report.

(2) *Post Authorization Advanced Engineering and Design (AE&D) Planning Report.* The Phase I GDM is the report which provides the affirmation or reformulation of an authorized project. The Phase II GDM is the report which presents the results of the detailed design and cost estimate studies. Under certain conditions the Phase I GDM may be combined with the Phase II GDM in a combined AE&D planning and design memorandum. Projects in this category will be reviewed to determine the adequacy of the final EIS on file at the time the project was authorized and what type of further NEPA documentation is required. Refer to §§ 230.10, 230.11(b) and Appendix C of this part for discussion on the use of an EA or EIS supplements.

(3) *Continuing authorities studies.* Continuing authorities studies are prepared under one of the following authorities for authorization by the Chief of Engineers or the Secretary of the Army;

Sec. 3, Flood Control Act of 1945 (Snagging and clearing for navigation)

Sec. 205, Flood Control Act of 1948 (Small flood control projects)

Sec. 208, Flood Control Act of 1954 (Snagging and clearing for flood control)

Sec. 107, River and Harbor Act of 1960 (Small navigation projects)

Sec. 103, River and Harbor Act of 1962 (Small Beach erosion projects)

Sec. 111, River and Harbor Act of 1968 (Mitigation for navigation shore damages)

Sec. 202, Water Resources Development Act of 1976 (Drift and debris removal — commercial harbors)

Such studies generally result in Detailed Project Reports (DPR) which serves as a general design memorandum and provides the basis for approval of a project for construction.

(c) *Projects in a construction status.* This category includes authorized projects or separable project features or units, or

major rehabilitation projects in a construction category. Actions in this category include the preparation of Feature Design Memorandum, Design Memorandum for Major Rehabilitation Projects, plans and specifications, and construction activities. Refer to § 230.11(b) and Appendix C for discussions on further NEPA documentation.

(d) *Operation and maintenance (O & M).* This category includes channel maintenance dredging and disposal activities, certain rehabilitation projects, the operation of dam and lake projects, lock and dam operations, aquatic plant control program and significant changes in the management of lands and project resources. Priority effort will be assigned to the preparation of an EIS for remaining O&M actions involving annually recurring dredging and disposal operations for which a final EIS has not been filed. A lesser priority effort will be assigned to any remaining O&M action on other completed projects.

33 C.F.R. § 230.7
Actions normally requiring an Environmental Assessment (EA) but not necessarily an EIS.

Listed below are types of Corps actions which require at least the preparation of an EA.

* * * * *

(e) *Regulatory permits.* See Appendix B.

33 C.F.R. § 320.4(a)
General Policies for evaluating permit applications.

The following policies shall be applicable to the review of all applications for Department of the Army permits. Additional policies specifically applicable to certain types of activities are identified in Parts 321-324.

(a) *Public interest review.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impact in-

cluding cumulative impacts of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The beneift which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of the general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, cultural values, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.

40 C.F.R. § 1500.4
Reducing paperwork.

Agencies shall reduce excessive paperwork by:

* * * * *

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1508.13).

40 C.F.R. § 1501.4
Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

* * * * *

40 C.F.R § 1508.27
Significantly

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may

make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

(3) (5)

Nos. 85-785 and 85-800

In the Supreme Court of the United States

OCTOBER TERM, 1985

RIVER ROAD ALLIANCE, INC., ET AL., PETITIONERS

v.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, ET AL.

STATE OF ILLINOIS, PETITIONER

v.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ELLEN J. DURKEE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

24 pp

QUESTIONS PRESENTED

1. Whether the court of appeals applied the correct standard of review in upholding the decision of the Corps of Engineers to issue a temporary barge fleeting facility permit without preparing an environmental impact statement.

2. Whether the Corps' consideration of alternative locations for the facility was adequate under the circumstances.

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OCTOBER TERM, 1985

No. 85-785

RIVER ROAD ALLIANCE, INC., ET AL., PETITIONERS

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23)[1] is reported at 764 F.2d 445. The opinion of the district court (Pet. App. 28-36) is unreported.

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[1] "Pet. App." refers to the separately bound appendix in No. 85-800.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24-25) was entered on May 17, 1985, and petitions for rehearing were denied on August 8, 1985 (Pet. App. 26-27). The petition for a writ of certiorari in No. 85-785 was filed on November 5, 1985, and the petition in No. 85-800 was filed on November 6, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In two suits, consolidated in the district court (Pet. App. 28), petitioners challenged the issuance of a permit by the United States Army Corps of Engineers to National Marine Service, Inc., for a temporary barge fleeting facility along the Illinois bank of the Mississippi River.[2] The facility involved is essentially a mooring area accommodating a maximum of 30 barges. The facility is to exist only until completion of a contemplated new lock and dam in approximately 1988 (Pet. App. 2; see note 4, *infra*); it does not entail any permanent alteration of land use or any permanent damage to the scenic characteristics of the area. Indeed, creation of the facility required only installation of three anchors, anchor chains, and mooring buoys to hold the barges in place (Pet. App. 38, 62). The Corps of Engineers permit

[2] Riverway Towing Company submitted the application. While the application was pending, Riverway Towing Company was purchased by National Marine Service. That purchase did not effect any change in the permit proposal or purpose for the facility (Pet. App. 43-44). The administrative record sometimes refers to Riverway Towing Company. However, for simplicity, we refer only to National Marine Service in this brief.

for the facility was issued pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403.[3]

The fleeting site is in Navigation Pool 26 or Alton Lake, a pool in the Mississippi River created by Lock and Dam 26. Alton Lake ordinarily experiences heavy barge traffic (Pet. App. 2). At its maximum capacity, the fleeting facility occupies 1,500 feet of the approximately 256 miles of Alton Lake shoreline (Pet. App. 2, 43, 59). The fleeting site is adjacent to the Great River Road, a national scenic highway that parallels the Mississippi River from Minnesota to the Gulf of Mexico (Pet. App. 30). The location is at the extreme upper end of the scenic bluffs along the River Road from Grafton to Alton, a distance of approximately 15 miles (Pet. App. 50). Almost directly landward from the site is a rock quarry (Pet. App. 53). The site is also just downriver from National Marine Service's shipyard and barge repair facility located in Grafton, Illinois (Pet. App. 2). The primary purpose of the facility is to provide an area to moor barges awaiting repair or pickup after repair at the National Marine Service repair yard (Pet. App. 43, 48).[4]

[3] Under Illinois law relating to riparian rights, see *Hardin* v. *Jordan*, 140 U.S. 371 (1891), riparian ownership or, as in this case, a lease from the riparian owner, is also required to establish the fleeting facility.

[4] In addition, National Marine Service intended to use the facility for general fleeting (Pet. App. 48). The limited capacity of existing Lock and Dam 26, and the disruptions caused by the construction of a new Lock and Dam 26, have caused chronic backlogs of barge tows awaiting passage through the lock (Pet. App. 48, 53). Delays of 72 hours at Lock and Dam 26 are not uncommon, and strings of barges held by churning towboats frequently queue up along the

The issued permit required National Marine Service to discontinue use of the site after notification of completion of the new Lock and Dam 26, expected in approximately 1988 (Pet. App. 2, 65). The permit contained several provisions designed to minimize environmental effects. For example, there was a monitoring requirement allowing the Corps to suspend, modify, or revoke the permit if there was evidence of significant damage to a mussel bed located downstream from the site. In addition, the permit prohibited mooring barges with dangerous cargoes, making major repairs, or transferring cargo at the site (Pet. App. 64-65). Other provisions required the minimization of the use of search lights and of noise from bullhorns and machinery (*ibid.*). Pursuant to this permit, National Marine Service operated the fleeting facility at the site during the one and one-half years of district court litigation (Pet. App. 4).

2. The application for the permit in question was submitted in August 1980. Upon receipt of the application, the Corps solicited comments from citizens, government officials, and government agencies. Although it was not required to do so, the Corps also

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River Road. By fleeting barges, these strings can be broken into smaller units, which reduces overall lockage time. Also, the need for towboats to hold barges with their engines running is eliminated (Pet. App. 47-48).

National Marine Service did not anticipate using this facility for general fleeting more than eight months in the year (Pet. App. 43). However, National Marine Service had available until after the permit issued another fleeting area (adjacent to its Grafton repair yard) leased from petitioner, State of Illinois. During the pendency of this lawsuit, the State cancelled the lease for that fleeting facility (Pet. App. 2).

held a public hearing to give interested parties an opportunity to express their views (Pet. App. 2, 9).

In conjunction with its public interest review of the permit application, see 33 C.F.R. Pts. 320, 325, the Corps prepared an environmental assessment (Pet. App. 38-42) and findings of fact (Pet. App. 43-67). Those documents concluded that the temporary fleeting permit would not have a significant effect on the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* (Pet. App. 42, 66). The Corps therefore did not prepare an environmental impact statement (EIS). See 40 C.F.R. 1501.4(b).

Specifically, the Corps concluded that the visual and aesthetic impact (which it viewed as an inherently subjective evaluation) was not so "significant" as to require an EIS. The rationale for this conclusion was that the facility is neither permanent nor large, not at the heart of the scenic area, and does not involve or encourage any construction of land-based facilities (Pet. App. 38-39, 49-50). The Corps also concluded that the historic villages of Elsah and Chautauqua would not be significantly affected. The environmental assessment and findings of fact noted that these villages were four miles and one and one-half miles downstream, respectively (Pet. App. 40-41, 62). The Illinois Department of Conservation Historic Preservation Office similarly advised the Corps that the fleet operation would have no effect on historic, architectural, or archaeological sites in the area (1 Admin. Rec., Exh. 7).

The Illinois Department of Conservation (IDOC) and the United States Fish and Wildlife Service (USFWS) initially opposed the fleeting proposal because of its possible adverse impact on a mussel bed

downstream from the fleeting site (1 Admin. Rec., Exhs. 15, 16, 17). Due to questions raised by those agencies, National Marine Service (at the Corps' suggestion) hired a consultant to study the bed and potential impacts (1 Admin. Rec., Exh. 32). The study concluded that the bed did not extend upriver from mile 217.1 (the fleeting site is at mile 217.3), and that the fleeting activity would not increase existing adverse impacts on the mussel bed caused by pollution and boat traffic (*ibid.*).[5] After review of the study and further discussions among the three agencies, USFWS and IDOC indicated that they would withdraw their opposition to the permit provided that a mussel monitoring requirement was included in the permit (1 Admin. Rec., Exh. 55). Because the monitoring plan advocated by the wildlife agencies would have cost the permit applicant $200,000, the Corps concluded that it was unreasonable, and proposed a permit condition requiring a less costly mussel monitoring plan (*ibid.*). Following notification that the Corps intended to issue the permit on that basis, the USFWS requested review of the District Engineer's decision by a higher Corps authority. Assistant Secretary of the Army William Gianelli concluded that further review of the District Engineer's decision was not warranted (Pet. App. 68-70), and a permit was issued to National Marine Service on October 5, 1982.

3. These two cases were filed by the River Road Alliance plaintiffs and the State of Illinois on September 22, 1982, and March 11, 1983, respectively. Plaintiffs alleged, inter alia, that the Corps violated

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[5] No federally-listed endangered species was collected during the study (*ibid.*).

NEPA by failing to prepare an EIS pursuant to 42 U.S.C. 4332(2)(C), and that the Corps failed to study, develop, and describe reasonable alternatives in violation of 42 U.S.C. 4332(2)(E).

The district court entered summary judgment in favor of petitioners, holding that the Corps' issuance of the permit violated NEPA because the Corps failed to take the necessary "hard look" at the environmental consequences of the project and failed to give adequate consideration to reasonable alternatives and other factors. The district court declared the permit invalid, and enjoined National Marine Service from conducting barge fleeting activities at the site. The district court stopped short, however, of deciding that the environmental impacts were so significant that they required preparation of an EIS.

On appeal to the Seventh Circuit the panel majority reversed, with instructions to vacate the injunction and dismiss the lawsuits. The appellate court ruled that the Corps' "decision not to prepare an environmental impact statement will be set aside only if it is an abuse of discretion" (Pet. App. 6). It reasoned that deferential, rather than plenary, review is appropriate because of the "indeterminate" meaning of "significant" in the statutory phrase "major Federal actions significantly affecting the quality of the human environment" (42 U.S.C. 4332(2)(C)), and the predictive judgment required in determining whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an EIS (Pet. App. 6). Based on the facts in the administrative record, the panel majority held that the Corps' conclusion that the fleeting facility would not have so significant an impact as to require an EIS was not arbitrary or

capricious (Pet. App. 9-12). The majority also held that the Corps' consideration of alternative sites was adequate under the circumstances, particularly in view of the fact that plaintiffs were unable to show that any plausible alternative site was overlooked (Pet. App. 12-13).[6] Petitioners' petitions for rehearing and suggestions for rehearing en banc were denied by an evenly divided court (Pet. App. 26-27).

ARGUMENT

1. The first question presented in No. 85-800 and the first two questions presented in No. 85-785 are closely related to the question presented in *Dravo Basic Materials Co.* v. *Louisiana*, No. 85-569, in which we have recently filed a brief in opposition.[7] In that case, an applicant for a Corps of Engineers' permit challenges the Fifth Circuit's use of a "reasonableness" standard (instead of the Administrative Procedure Act "arbitrary and capricious" standard) to review the adequacy of an environmental assessment prepared by the Corps before it issued the permit. In our brief opposing certiorari in *Dravo*, we discussed our concern that the test enunciated in that case may not give sufficient deference to agency expertise, but concluded that the judgment in *Dravo*, remanding the case to the district court for reconsideration, did not warrant this Court's review at this time. Nor do we think that further review is warranted in this case, because—although we do not agree entirely with the Seventh Circuit's rationale (see note 8, *infra*)—the case was correctly decided.

[6] Judge Wood dissented (Pet. App. 15-23), agreeing with the district court's evaluation of the record.

[7] We are sending petitioners copies of that brief.

a. As we explained in our brief in *Dravo*, we are in essential agreement with the observation of the court below that "[t]here is plenary review and there is deferential review, and whether it is fruitful to attempt fine gradations within the second category may be doubted" (Pet. App. 7). Thus, although the court referred to its test as an "abuse of discretion" standard (Pet. App. 6), and the State petitioners assume that this is equivalent to the "arbitrary and capricious" standard, we do not find particularly significant the words employed by a court in describing the nature of its review. Rather, as the Seventh Circuit correctly noted, the more critical matter is whether the substance of such review was sufficiently deferential. Brief in Opposition at 6-8, in *Dravo Basic Materials Co.* v. *Louisiana*, *supra*. As final agency action based upon an administrative record, albeit an informal one, the Corps' determination that no EIS was required is altogether appropriate for review under the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. 706(2)(A). The deferential standard of review prescribed by Section 706(2)(A) precludes a court from second guessing an agency's scientific or expert judgment (cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543-548, 555-558 (1978)) or substituting its judgment for that of the agency as to the wisdom or desirability of a particular project in the guise of reviewing NEPA compliance. *E.g.*, *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*; *Strycker's Bay Neighborhood Council* v. *Karlen*, 444 U.S. 223, 227-228 (1980).

The Seventh Circuit properly observed these limitations in its review of the Corps' decision that the in-

stant permit should be issued without an EIS.[8] For example, with regard to aesthetic impacts, the court stated that "whether a 1,500 foot line of barges, though undoubtedly an eyesore in a place of natural beauty, represents so significant a degradation of the environment as to require the Corps to prepare an environmental impact statement is a sufficiently close question to prevent us from substituting our judgment for the Corps' " (Pet. App. 10).[9]

b. The River Road Alliance petitioners assert that the court of appeals engaged in a de novo review of the environmental consequences and erroneously sub-

[8] The panel majority opinion suggests a somewhat novel basis for an agency's decision in these types of cases by stating that "to interpret [significant impact] sensibly in particular cases requires a comparison that is also a prediction: whether the time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides" (Pet. App. 6). The Corps does not base its decisions as to the need to do environmental impact statements on the evaluation of cost versus likely benefits. We do not interpret the court's opinion as requiring agencies to embark on such a cost-benefit analysis. The majority opinion, read as a whole, shows that the court reviewed the reasonableness of the Corps' conclusion in light of the intensity and context of the environmental consequences of the issuance of the permit. No more is required—or appropriate.

[9] In upholding the Corps' conclusion that the aesthetic impacts were insignificant, the court below considered all of the evidence, not just the scenic properties of the area on which petitioners entirely rely. This evidence includes testimony that not all people are offended by the sight of barges, that there are already heavy barge traffic and National Marine Service's shipyard in the immediate vicinity, and that the facility is temporary and upon removal will not leave any damage to the scenic properties of the area (Pet. App. 10).

stituted its judgment for that of the Corps.[10] This contention is based on a mischaracterization of the appellate court's holding. In any event, it is difficult to understand how the court of appeals could have substituted its judgment for that of the Corps when it upheld the Corps' determination.[11]

Specifically, the contention (85-785 Pet. 29) is that the court of appeals erroneously recast the main issue on appeal to be whether the Corps should have prepared an environmental impact statement (Pet. App. 4), and that the court should instead have ordered (as did the district court) that the Corps rewrite its environmental assessment and reconsider its decision based on another "hard look" at the environmental consequences.[12]

[10] In contrast, the state petitioner contends that the court of appeals applied too deferential a standard.

[11] Accordingly, the River Road petitioners' quibbles concerning factual findings (85-785 Pet. 31-34) present no question warranting this Court's review—especially insofar as they are based merely on complaint allegations (see *id.* at 4 n.2).

[12] Petitioners err in relying on *Fritiofson* v. *Alexander*, 772 F.2d 1225 (5th Cir. 1985), to support their position here. In *Fritiofson*, another NEPA case involving a Corps permit, the district court held inadequate an environmental assessment that concluded with a finding of no significant impact. As a remedy, the district court ordered preparation of a comprehensive EIS although it had made no finding concerning the likelihood of any significant environmental effects resulting from the issuance of the permits (772 F.2d at 1248). The government did not appeal the holding as to the adequacy of the environmental assessment, because it was willing to supplement that assessment (772 F.2d at 1234). However, the government successfully appealed the order to prepare an

The government argued on appeal, however, that the district court's and petitioner's demand for more written analysis and discussion in the environmental assessment and findings of fact was tantamount to requiring the Corps to incorporate the same type and depth of analysis that is ordinarily made in an EIS into the environmental assessment—a duplicative requirement not sanctioned by NEPA. In other words, the court below was precisely correct in stating that "it [is] hard to see how the Corps could have met [the district court's] objections to the adequacy of its environmental assessment without [preparing an EIS]" (Pet. App. 4). Moreover, in the courts below petitioners supported their contentions that the Corps did not take a "hard look" at the environmental consequences in the environmental assessment by arguing that the facts in the administrative record demonstrated significant impacts requiring an EIS. Thus, the court of appeals reasonably described the principal issue on appeal.

c. The River Road Alliance petitioners also incorrectly assert (85-785 Pet. 38-39) that the court of appeals held that the regulations of the Council on Environmental Quality are not binding on federal agencies. This is a manifestly incorrect reading of the court's decision (see Pet. App. 8). The court of appeals simply characterized the Council's regulatory attempt to define "significantly" (40 C.F.R. 1508.27), as "nondirective" (Pet. App. 8). That description accurately reflects the fact that the regulation lists ten generally-worded factors for consideration in evaluating the intensity of a project's impacts, and ex-

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EIS in the absence of any finding of significant impact (772 F.2d at 1248). *Fritiofson* nevertheless reaffirms the standard enunciated in *Dravo*.

plicitly recognizes that significance varies with the setting of the proposed action. The court of appeals' passing description of the regulation at most suggests that it is too generalized to resolve the ultimate decision as to "significance" in any particular factual circumstance.

d. Seventeen states, filing as amici curiae, contend that a writ of certiorari should be granted because the court of appeals inadequately considered the scenic and recreational value of the area. Besides being refuted by the court's specific focus on that issue (Pet. App. 10), amici's submission has no basis in law. 40 C.F.R. 1508.27(b)(3) does not require, as amici would have it, that the Corps must give determinative weight, in making its NEPA decision, to a state policy of protecting the natural beauty of an area. Rather, that regulation plainly states that consideration is to be given to "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment" (40 C.F.R. 1508.27(b)(10)). Amici concede (Br. 7) that the Corps considered such legal requirements, and correctly concluded that none were violated.

Amici's argument also erroneously assumes that there has been a consistent governmental policy of protecting the natural beauty of this stretch of the Mississippi River. The record shows otherwise. For example, the City Council of the town closest to the fleeting site (Grafton) and the county government (Jersey County) officially endorsed the permit proposal (3 Admin. Rec. 72, 82-83). And, while the federal government has expended funds for the River Road, so too there is a federal interest in facilitating the use of the Mississippi River for barge traffic

as evidenced by substantial federal expenditures on new Lock and Dam 26. Pub. L. No. 95-502, § 102, 92 Stat. 1695. As for the State of Illinois, it leased a contiguous site for fleeting, it never voiced official opposition on aesthetic grounds during the administrative proceedings (although it was fully consulted by the Corps), and its own agency responsible for historical values concluded that the fleeting permit would have no effect on historic sites (Pet. App. 2; 1 Admin. Rec., Exh. 7). Moreover, the Corps and the Illinois Department of Transportation initially worked together in processing the permit applications made to both agencies by, for instance, holding a joint public hearing (Pet. App. 45-46).[13] That is precisely the sort of state and federal cooperation contemplated by 40 C.F.R. 1506.2.

2. Both petitions present the question of the Corps' compliance with Section 102(2)(E) of NEPA, 42 U.S.C. 4332(2)(E). Even when an EIS is not required, Section 102(2)(E) requires agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." [14] Petitioners argue that the court of appeals erroneously sanctioned an improper delegation to the permit applicant of the Corps' responsibility to study alternative sites (85-

[13] The state agency later withdrew from this joint review effort simply because the state legislature effectively terminated any state permit requirement. 1 Admin. Rec., Exh. 42.

[14] However, an agency may consider a narrower range of alternatives under Section 102(2)(E) than would be required in an EIS. *City of New York* v. *United States Department of Transportation*, 715 F.2d 732, 744 (2d Cir. 1983), cert. denied, 465 U.S. 1055 (1984).

800 Pet. 20; 85-785 Pet. 46-47). Petitioners further argue (85-800 Pet. 18-19; 85-785 Pet. 46-47) that the court erred in suggesting that they "shoulder the burden" of demonstrating that plausible alternative sites were overlooked. Contrary to their arguments, the court's decision is correct and does not conflict with any decision of this Court or any other court of appeals.

a. When the federal action contemplated is simply the issuance of a permit to a private party, the federal agency's NEPA obligation "'is to determine whether the proposed site is environmentally acceptable,' and not, as in the case of a publicly funded project, 'to undertake to locate what [the agency] would consider to be the optimum site for a new facility.'" *Roosevelt Campobello International Park Commission* v. *United States Environmental Protection Agency*, 684 F.2d 1041, 1046 (1st Cir. 1982). Here, for example, the Corps does not have the authority or business expertise to make locational decisions for National Marine Service. Moreover, in order to establish a fleeting facility, National Marine Service must acquire riparian rights as well as obtain a Corps permit. The Corps cannot force riparian owners to grant such rights. National Marine Service submitted to the Corps a consultant's study and other information showing that National Marine Service had reviewed and rejected all alternative sites in reasonable proximity to its repair yard. Other sites did not meet the physical requirements for fleeting, or were not available for lease for fleeting purposes (Pet. App. 12-13; District Court Docket Entry 47 in No. 85-785; 2 Admin. Rec. 19). The Corps District Engineer in his findings of fact opined that prospective alternative sites existed, but in light

of National Marine Service's stringent location needs —*i.e.*, proximity to its repair yard—he concluded that no other site would be an improvement (Pet. App. 58).[15]

While petitioners contended that the Corps failed to study and consider alternative sites adequately, at no time did petitioners identify any feasible alternative site that was not considered. The court below simply held that the Corps was not required to conduct a further study of alternative sites in the absence of any showing by petitioners that the Corps and National Marine Service consultant's study overlooked some plausible alternative site (Pet. App. 12-13).

b. The Corps' acceptance and use of the study and information on alternative sites submitted by National Marine Service is not a NEPA violation. To the contrary, it is sanctioned by the NEPA regulations; indeed, the regulations authorize an agency to allow a permit applicant to provide the entire environmental assessment. See 40 C.F.R. 1506.1(b); 33 C.F.R. Pt. 230, App. B para. 8(b). "Nothing in NEPA

[15] By selective quotation (85-800 Pet. 21), the state petitioner miscasts the District Engineer's finding and evaluation with respect to alternative sites. In context, the District Engineer concluded that alternative sites existed, but that they were too distant to meet National Marine Service's purposes (Pet. App. 58). Consistent with that meaning, the District Engineer explained (*ibid.*) that another permit application (SCNO)—which sought a fleeting permit for an area contiguous to the site in question here—did not have location needs that were as stringent, and that SCNO found an alternative site. SCNO sought a permit for general fleeting purposes only, not, as here, to provide fleeting for a fixed-location repair yard (*ibid.*). Eventually SCNO withdrew its application for the contiguous site and obtained a permit for a site that is located a considerable distance from National Marine Service's repair yard. Pet. App. 58.

or the regulations says that the agency cannot adopt a report furnished by the applicant in whole or in part." *Lake Erie Alliance* v. *United States Army Corps of Engineers*, 526 F. Supp. 1063, 1073 (W.D. Pa. 1981), aff'd, 707 F.2d 1392 (3d Cir.) (Table), cert. denied, 464 U.S. 915 (1983). Accord, *Save Our Wetlands, Inc.* v. *Sands*, 711 F.2d 634, 643 (5th Cir. 1983) (approving Corps' reliance on consultant's report submitted by applicant). That the Corps independently reviewed the study by National Marine Service is demonstrated by the Corps' criticism of certain aspects of it (see pages 15-16, *supra*). The Corps was not obliged by NEPA to ignore that study and conduct its own wholly independent study. Furthermore, National Marine Service's location needs were factors that the Corps properly took into account. The extent to which alternatives must be considered under NEPA is always a function of the objective of the project. See, *e.g.*, *City of New York* v. *United States Department of Transportation*, 715 F.2d at 743; *South Louisiana Environmental Council, Inc.* v. *Sand*, 629 F.2d 1005, 1017 (5th Cir. 1980); *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974).

c. The appellate court also correctly held that petitioners' bald assertion that alternative sites were not adequately studied was insufficient to prove a NEPA violation. In suits challenging compliance with NEPA, the plaintiffs bear the burden of demonstrating that reasonable alternatives were not considered. *E.g.*, *Texas Committee on Natural Resources* v. *Marsh*, 736 F.2d 262, 270 (5th Cir. 1984);[16] *Life*

[16] In that case, the Fifth Circuit stated (emphasis in original): "[T]he district court required the Corps to prove that its selection of alternative water-supply sources was reason-

of the Land v. *Brinegar*, 485 F.2d 460, 471 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974); *Roosevelt Campobello International Park Commission*, 684 F.2d at 1047.[17] Thus, in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. at 553-555, this Court responded to an argument that an alternative was impermissibly omitted from consideration by emphasizing that a challenging party must alert the agency in the administrative proceeding to its contentions; comments must be specific and focused, not merely a "cryptic and obscure reference to matters that 'ought to be' considered" (*id.* at 554).

The Corps' consideration of alternative sites was adequate under the circumstances. Particularly in view of the fact that petitioners utterly failed to demonstrate at any stage of the administrative or judicial proceedings that any plausible alternative site for this fleeting facility was overlooked, the court of appeals had no basis for finding otherwise.

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able. This approach turns the review process on its head: it is the party seeking to invalidate an EIS, *not the agency*, which has the burden of proof on this issue. The plaintiffs continue this error on appeal. In their brief, rather than argue that they have demonstrated the choices to be unreasonable, they argue that the Corps has not demonstrated these choices to have been reasonable."

[17] The State petitioner's sole support (85-800 Pet. 22) for the proposition that a plaintiff challenging NEPA compliance has no such burden of proof is *Scherr* v. *Volpe*, 466 F.2d 1027, 1034 (7th Cir. 1972). The cited passage in *Scherr* simply states that the irreparable harm for purposes of a preliminary injunction flowed from the NEPA violation, so that plaintiffs did not have the burden of proving interim irreparable environmental harm.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ELLEN J. DURKEE
Attorney

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No. 85-800

IN THE

Supreme Court of the United States

October Term, 1985

PEOPLE OF THE STATE OF ILLINOIS,
Petitioners,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATE OF MINNESOTA AND 16 OTHER STATES AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
JOHN R. TUNHEIM
Solicitor General
Counsel of Record
515 Transportation Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-7537
Attorneys for Amicus Curiae
State of Minnesota

Of Counsel:
JEAN BOLER
JERILYN AUNE
Special Assistant
Attorneys General

(Attorneys General of Counsel listed inside)

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

Attorneys General of Counsel

JOSEPH LIEBERMAN
Attorney General
State of Connecticut

CHARLES M. OBERLY, III
Attorney General
State of Delaware

JAMES SMITH
Attorney General
State of Florida

RICHARD G. OPPER
Attorney General
Territory of Guam

THOMAS J. MILLER
Attorney General
State of Iowa

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

FRANK J. KELLEY
Attorney General
State of Michigan

WILLIAM L. WEBSTER
Attorney General
State of Missouri

ROBERT M. SPIRE
Attorney General
State of Nebraska

LACY H. THORNBURG
Attorney General
State of North Carolina

NICHOLAS J. SPAETH
Attorney General
State of North Dakota

ANTHONY J. CELEBREZZE, JR.
Attorney General
State of Ohio

W. J. MICHAEL CODY
Attorney General
State of Tennessee

JEFFREY L. AMESTOY
Attorney General
State of Vermont

Commonwealth of Virginia
By WILLIAM J. BROADDUS

A. G. McCLINTOCK
Attorney General
State of Wyoming

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STATEMENT OF INTEREST

The amici states, through their attorneys general, respectfully offer this brief in support of the petition for a writ of certiorari. This case raises issues of considerable public importance the resolution of which will directly impact on the policies and actions of the amici states.

Most states have areas of particular natural beauty which they shield from inconsistent commercial and industrial activities. Although these pristine settings often represent only a small portion of any state and, taken together, a small portion of the nation, they are highly prized for the sense of well-being they impart to residents and the attraction they hold for tourists.

States are limited, however, in the extent to which they can protect these areas from inconsistent uses. When a federal agency has the power to issue permits, states must rely on the National Environmental Policy Act (NEPA) as the major means for protecting these havens of natural beauty from commercial and industrial intrusions. Because of their interest in securing the full protection of NEPA for scenic and recreational areas within their respective states, amici submit this brief in support of the petition.

SUMMARY OF THE ARGUMENT

The amici states agree with the arguments the State of Illinois puts forward in its petition for writ of certiorari. Application of the more searching reasonableness standard is necessary in reviewing a finding of no significant impact to ensure that federal agencies take the requisite "hard look" at the environmental effect of a proposed project. In addition, agencies cannot shirk their statutory duty to "study, develop, and describe appropriate alternatives to recommended courses of action" (42 U.S.C. § 4332(2)(E) (1985)) whenever a permit applicant simply claims there is no feasible alternative to a proposed action. Amici believe these points were adequately addressed in Illinois' petition and will focus instead on the Seventh Circuit's errors in assessing the significance of the federal agency's proposed action.

The Seventh Circuit did not adequately consider the scenic and recreational uses of Alton Lake in holding that barge fleeting had no significant environmental impact. Case law and the regulations of the Council on Environmental Quality (CEQ) require that federal agencies prepare an Environmental Impact Statement (EIS) when a proposed federal action is inconsistent with the local land use policy of preserving the natural environment. The Seventh Circuit should also have given more weight to aesthetic considerations in light of Alton Lake's scenic and recreational value.

In addition, the court wrongly considered the speculative cost of preparing an EIS in determining whether commercial barge fleeting would significantly impact the local environment. Not only is consideration of this cost factor unwarranted under the statute and regulations, but the court's inflated cost estimate unfairly tipped the balance toward finding

the fleeting activity had no significant impact. Because many of the scenic areas the states seek to preserve are not large, and the impact of inconsistent activities is hard to quantify, allowing consideration of the cost of preparing an EIS will too often result in a finding of no significant impact in scenic and recreational areas.

If the Seventh Circuit's decision is allowed to stand, it will seriously inhibit state attempts to protect areas of natural beauty within their borders. The reasonableness standard, the agencies' duty to consider alternative sites, and the consideration of land use and aesthetic factors in determining the significance of an action are all important components of NEPA protection which amici urge the Court to explicitly recognize.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ADEQUATELY CONSIDER THE SCENIC AND RECREATIONAL USES OF ALTON LAKE IN HOLDING THAT BARGE FLEETING HAD NO SIGNIFICANT ENVIRONMENTAL IMPACT.

Congress created the Great River Road in 1973 to provide people with access to the Mississippi River's scenic views and recreational activities. The State of Illinois joined in the effort by acquiring scenic easements along the river in the area of Alton Lake. Despite these efforts, the Army Corps of Engineers (Corps) issued a permit to a barge fleeting facility which will be, in the words of the Seventh Circuit, "an unfortunate eyesore, marring one of the few remaining spots of essentially unspoiled natural beauty on the Mississippi in the general vicinity of St. Louis." *River Road Alliance, Inc. v. Corps of Engineers of the United States Army,* 764 F.2d 445, 450 (7th Cir. 1985). Barge fleeting, in light of the state and federal efforts to preserve this scenic area, constituted a significant environmental impact requiring an EIS.

The creation of the Great River Road and Illinois' purchase of scenic easements are important factors in determining whether a commercial activity in that scenic area significantly affects the quality of the local environment. NEPA contemplates a cooperative relationship between federal, state and local governments. 42 U.S.C. §§ 4331(a), 4332(2)(C) (1985). Under the applicable regulations federal agencies are to cooperate with states "to the fullest extent possible." 40 C.F.R. § 1506.2(b) (1985). Here, both the federal and state governments have taken steps to protect the natural beauty of this stretch of river. To preserve the cooperative spirit essential

to the NEPA, federal agencies must consider whether a proposed action is in harmony with state plans for an area in assessing the significance of the action's impact.

Moreover, federal agencies are legally obligated to consider inconsistencies with local land use policy in assessing environmental impact. *Isle of Hope Historical Ass'n, Inc. v. United States Army Corps of Engineers*, 646 F.2d 215, 220 (5th Cir. 1981). Federal action consistent with local policy will generally have only an incremental environmental effect. When, on the other hand, the federal government overrides local protections, the impact is more keenly felt. *Maryland-National Capital Park and Planning Commission v. United States Postal Service*, 487 F.2d 1029, 1036 (D.C. Cir. 1973). Agencies should give local land use policy even more consideration when proposed actions threaten scenic and recreational areas preserved for their natural beauty. *See Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 613-16 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

The CEQ regulations defining significant impact reflect the concern for preserving local areas of natural beauty. 40 C.F.R. § 1508.27 (1985). Although the Seventh Circuit found these regulations to be "of little help," federal agencies are to accord them substantial deference. *Andrus v. Sierra Club*, 442 U.S. 347, 356-58 (1979); *Fritiofson v. Alexander*, 772 F.2d 1225, 1236 (5th Cir. 1985); *Sierra Club v. Marsh*, 769 F.2d 868, 873 (1st Cir. 1985).

Under the CEQ regulations, agencies must consider both the context and the intensity of their actions in determining whether they significantly affect the environment. 40 C.F.R. § 1508.27 (1985). Consideration of the context means significance can vary with the setting of the proposed action. Where the impact is site specific as in the instant case, the agency

should assess the effects in the specific locality, regardless of whether the action may affect the human environment as a whole. 40 C.F.R. § 1508.27(a) (1985). In evaluating intensity, agencies are specifically directed to consider the "unique characteristics of the geographic area such as proximity to . . . park lands [and] wild and scenic rivers." 40 C.F.R. § 1508.27(b)(3) (1985). Moreover, agencies are to consider "whether the action threatens a violation of federal, state or local law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27(b)(10) (1985).

The Corps avoided the directive of this last section by noting that the applicant's proposal would not "constitute a violation of the scenic easements acquired by the State of Illinois [because] [t]he easements apply only to specified areas lying landward of the landward edge of the Great River Road." Findings of Fact, Petitioners' Appendix at 55. The Corps may have avoided violating Illinois' scenic easements by permitting obstructions on the water rather than on the land, but it nonetheless violated its statutory duty. Technical violations of local law are not the touchstone for determining significant impact; rather it is the effect of the action given the state's policy in the particular area. In the instant case, permitting a commercial barge fleeting facility on a stretch of river reserved for scenic and recreational uses should be considered an action significantly affecting the environment.

Both the Seventh Circuit and the Corps also chose to ignore the CEQ regulation which directs federal agencies to consider the degree to which the proposed actions are likely to be highly controversial. 40 C.F.R. § 1508.27(b)(4) (1985). The term "controversial" refers to "cases where substantial dispute exists as to the size, nature or *effect* of the major federal action." *Foundation for North American Wild Sheep v. United States Department of Agriculture*, 681 F.2d 1172, 1182 (9th

Cir. 1982), quoting *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973) (emphasis in original).

Where the main value of an area is in its scenic and recreational uses, opposition to an inconsistent use is an indication that a substantial dispute exists as to the effect of the federal action. The Corps received strong objections to the proposed fleeting along the Great River Road in response to its solicitation of comments, including a petition signed by one thousand citizens who requested a hearing and offered objections. Findings of Fact, Petitioners' Appendix at 45. Most of the approximately 300 people who attended the public hearing were opposed to the barge fleeting because it marred and obstructed the natural beauty of the river and bluffs along the Great River Road. This degree of disagreement about the aesthetic impact of the barge fleeting earmarks the Corps' action as precisely the type of controversial undertaking for which an EIS must be prepared.

Contrary to the Seventh Circuit's opinion, aesthetic impact alone is enough to compel preparation of an EIS when federal action threatens state scenic and recreational areas. Congress declared the importance of aesthetics to national environmental policy when it provided that the federal government's responsibility is to "assure for all Americans . . . esthetically and culturally pleasing surroundings." 42 U.S.C. § 4331(b)(2) (1985). The aesthetic value of a place includes its "existence value . . . the feeling some people have just knowing that somewhere there remains a true wilderness untouched by human hands." *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1322 n. 27 (8th Cir. 1974). In that case, the court considered as important the effect that the visibility of logging roads would have on the "rustic natural beauty" of the Boundary Waters Canoe Area. *Id.* at 1322.

The difficulty of measuring aesthetic effects should not prevent them from being the basis for requiring an EIS. "[T]he elusive character of aesthetics does not mean that such concerns are less weighty. Rather, the impossibility of quantification means, at most, that a finding as to the role of aesthetics need not be supported by statistical evidence." *City of New Haven v. Chandler*, 446 F.Supp. 925, 930 (D. Conn. 1978). Moreover, where a state, as the representative of its people, acquires scenic easements in order to preserve an area's natural beauty and provide public access to its vistas, the aesthetic value cannot be dismissed as a matter of individual taste. Such action indicates a community, as opposed to individual, decision that an area is aesthetically pleasing.

Aesthetics must be given substantial consideration when the question is whether commercial activity may invade an area preserved for enjoyment of the natural environment. Here, the scenic area is one of the few natural refuges in proximity to a major urban center. Regardless of other activities on the river, this fleeting facility may be "the straw that breaks the back of the environmental camel," in terms of Illinois' attempt to preserve some unspoiled beauty on the Mississippi. *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972) (*Hanly II*), *cert. denied*, 412 U.S. 908 (1973).

In enacting NEPA, Congress required agencies to take a "hard look" at the environmental consequences before taking action. *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976). Whether reviewed under an arbitrary and capricious standard or a reasonableness standard, the Corps has failed to take a hard look at the effect of its action on the scenic and recreational uses of Alton Lake. If allowed to stand, the court's interpretation of NEPA law

will have an adverse effect on all state and local government plans to protect scenic and recreational areas. States will be discouraged from preserving areas of natural beauty if they are not assured that at the very least an EIS will be required when federal agencies permit commercial activity in protected areas.

II. THE SPECULATIVE COST OF PREPARING AN ENVIRONMENTAL IMPACT STATEMENT SHOULD NOT BE A FACTOR IN DETERMINING WHETHER AN AGENCY'S ACTION HAS A SIGNIFICANT ENVIRONMENTAL IMPACT.

Judge Posner states "the purpose of an environmental assessment is to determine whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an environmental impact statement." Neither the CEQ regulations nor any other circuit court opinion has suggested that the expense of preparing an EIS has any bearing at all on the question of whether environmental effects are significant. *See* 40 C.F.R. § 1508.9 (1985).[1] An EIS must be prepared if substantial questions are raised as to whether a project "may cause significant degradation of some environmental factor." *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973). Clouding the issue with inflated estimates of the cost of preparing an EIS is contrary to the intention of the statute.

[1] Section 1508.9 provides that the purpose of an environmental assessment is to (1) briefly provide sufficient evidence and analysis for determining whether or not to prepare an environmental impact statement, (2) aid an agency's compliance with the Act when no environmental impact statement is necessary, and (3) facilitate preparation of the statement when one is necessary.

The relevance of the cost of preparing an environmental impact statement turns on Judge Posner's assumption that the Environmental Assessment (EA) is merely a less expensive version of the EIS. He states that the significance of an impact can be measured by determining whether the "time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides." Under NEPA and its implementing regulations, however, an EA is not a substitute for an EIS; they serve very different purposes. *Sierra Club v. Marsh*, 769 F.2d 868, 875 (1st Cir. 1985). The purpose of an EA is simply to identify and gauge the significance of potential impacts on the environment. An EIS is an indepth study which gives a federal agency the data necessary to decide whether or not to go forward with a project that involves significant impacts and how to mitigate those impacts. *Id.*; 40 C.F.R. § 1502.1 (1985).[2]

Even if a cost benefit analysis were somehow appropriate at this stage, the court unfairly assumes that the cost would

[2] 40 C.F.R. § 1502.1 provides:

> The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

be so great as to be prohibitive in most cases. The court states that the implementing regulations require an EIS to be a "formidable document". On the contrary, CEQ regulations state that the text of final environmental impact statements shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages. 40 C.F.R. § 1502.7 (1985). Since agencies are required to give substantial deference to these regulations, presumably the more unwieldy EIS of the past will give way to trimmer future versions.

Furthermore, the court's cost benefit analysis fails to take into consideration that the most litigated issue under NEPA is whether an action requires an EIS. *See* Council on Environmental Quality Annual Report (1979). In the long run, agencies may save time and expense by devoting effort to the production of an EIS, instead of trying to prove an EIS is not needed. *Sierra Club v. Marsh, supra,* 769 F.2d at 875; *Maryland-National Capital Park and Planning Commission v. U. S. Postal Service, supra,* 487 F.2d at 1040.

CONCLUSION

When federal, state and local governments set aside certain areas for public enjoyment because of their natural beauty, federal agencies should not lightly conclude that commercial or other activity inconsistent with scenic and recreational enjoyment has no significant impact. Local land use policy and aesthetic considerations are important factors in this context. Moreover, the cost of preparing an environmental impact statement should have no bearing on the threshold question of whether an impact is significant enough to warrant an EIS. If the Seventh Circuit's interpretation of NEPA law is allowed to stand, it will undermine state efforts to preserve areas of unspoiled beauty and discourage similar efforts in the future.

Because the Court of Appeals misconstrued NEPA law on these points and the points raised in Illinois' petition for a writ of certiorari, amici curiae join the Petitioners in urging the Court to grant the writ of certiorari and to reverse the decision of the Seventh Circuit.

Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
JOHN R. TUNHEIM
Solicitor General
Counsel of Record
515 Transportation Building
Saint Paul, MN 55155
Telephone: (612) 296-7537
Attorneys for Amicus Curiae
State of Minnesota

Of Counsel:
JEAN BOLER
JERILYN AUNE
Special Assistant
Attorneys General

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

(5) RIVER ROAD ALLIANCE, INC., ET AL.
85–785 *v.*
CORPS OF ENGINEERS OF THE UNITED STATES ARMY ET AL.

(6) ILLINOIS
85–800 *v.*
CORPS OF ENGINEERS OF THE UNITED STATES ARMY ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 85–785 AND 85–800. Decided March 3, 1986

The petitions for writs of certiorari are denied.

JUSTICE WHITE, dissenting.

In 1980, respondent National Marine Service applied to respondent Army Corps of Engineers for a permit to construct a temporary barge fleeting facility on the Mississippi River. After holding a public hearing on the environmental effects of the proposed facility, the Corps issued a brief "environmental assessment" concluding that the facility would have no significant environmental effects. Based on this conclusion, the Corps determined that it was not required to prepare an Environmental Impact Statement (EIS) on the proposed project, since such an EIS is required by the National Environmental Policy Act (NEPA), 42 U. S. C. § 4332(2)(C), only for projects that will "significantly affect . . . the quality of the human environment." Thus, the Corps issued the permit sought.

Petitioners, the State of Illinois and others including the River Road Alliance, Inc., brought suit in the United States District Court for the Southern District of Illinois, challenging the issuance of the permit and the Corps' underlying find-

ing of no significant environmental effects. On the petitioners' motion for summary judgment, the District Court found that "[w]hile paying lip service to [NEPA], the Corps has failed to take the 'hard look' required to support its conclusions, and has failed to document that 'hard look' in the Environmental Assessment . . . ." Appendix to Petition of State of Illinois, 33. Based on this conclusion, the District Court held that the Corps' action was arbitrary and capricious and entered judgment in favor of the petitioners.

On appeal, the United States Court of Appeals for the Seventh Circuit reversed. While observing that that Court had previously held that an agency's decision not to prepare an EIS is reviewed only for an abuse of discretion, see, *e. g.*, *Wisconsin* v. *Weinberger*, 745 F. 2d 412, 417 (CA7 1984), the Court of Appeals in this case acknowledged that other Courts of Appeals have held that such decisions are reviewed for reasonableness. 764 F. 2d 445, 449. Having noted these differing formulations, the Court of Appeals expressed its doubt as to the "practical difference" between the two standards: "There is plenary review and there is deferential review, and whether it is fruitful to attempt fine gradations within the second category may be doubted, though there is no need to resolve our doubt here." *Ibid.* The Court then declined to substitute its judgment for the Corps' and reversed the decision of the District Court.

Although the precise contours of the Court of Appeals' review in this case are somewhat unclear, the decision below again presents to this Court the unresolved question of the standard of review to be applied by courts reviewing an agency decision not to prepare an EIS. I have noted before the divergent standards of review invoked by the various Courts of Appeals in this context, see *Gee* v. *Boyd*, —— U. S. ——, —— (1985) (WHITE, J., dissenting from denial of certiorari), and I will not again detail the alignment of the lower courts here. I reiterate, however, my previously-expressed view that "[t]his conflict is not merely semantic or ac-

ademic": The courts that invoke the abuse-of-discretion or arbitrary-and-capricious standard emphasize that the decision is committed to the agency's discretion and expertise; the courts that invoke the reasonableness standard, in contrast, stress the non-discretionary nature of NEPA's language. *Id.*, at ——. Because this conflict among the circuits raises a significant question as to the proper interpretation of a federal statute, because this question recurs regularly, and because I believe that the issue is not merely one of semantics, I would grant certiorari to resolve the issue.